Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

HYUNDAI MERCHANT MARINE COMPANY, LTD., and BRITANNIA STEAM SHIP INSURANCE ASSOCIATION LIMITED,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

DAWN M. SCHOCK
Counsel of Record
MICHAEL H. WOODELL
DOUGLAS R. DAVIS
KEESAL, YOUNG & LOGAN
A Professional Corporation
400 Oceangate
Post Office Box 1730
Long Beach, California 90801-1730
Telephone (562) 436-2000

Attorneys for Petitioners HYUNDAI MERCHANT MARINE COMPANY, LTD. and BRITANNIA STEAM SHIP INSURANCE ASSOCIATION LIMITED

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Must a party which incurs its own costs in responding to and cleaning up an oil spill also pay for the Coast Guard's administrative costs incurred in monitoring the party's environmental response operation? In *National Cable Television Association v. United States* (NCTA), 415 U.S. 336 (1974), this Court held that in order for a governmental agency to recover administrative oversight costs that did not inure directly to the benefit of the regulated party, Congress must clearly indicate its intention to delegate its taxing authority to the executive agency. The Third Circuit Court of Appeals has applied the NCTA doctrine to preclude the Environmental Protection Agency from recovering its costs incurred in monitoring the environmental clean-up efforts of a private party under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). The Fifth Circuit Court of Appeals has refused to apply the NCTA doctrine stating that environmental clean up costs do not come within the purview of the doctrine. In this case the Ninth Circuit joins the Fifth in refusing to apply the NCTA doctrine to environmental clean-up costs under the Oil Pollution Act of 1990 ("OPA") creating a conflict among the circuit courts of appeals that should be resolved to preserve uniformity.

2. When the district court action is the first time that a responsible party may challenge the costs charged to it by the Coast Guard under the OPA, does the application of the arbitrary and capricious standard of review, without regard to whether a particular cost was also "prudent, or necessary, or reasonable," violate the responsible party's constitutional right to due process?

QUESTIONS PRESENTED – Continued

3. Was the Ninth Circuit correct in allowing the recovery of all monitoring costs, all base costs and attorneys fees in all actions by the Government, when Congress has (a) included the term "monitoring costs" in one section of the OPA but omitted it from the definition of recoverable removal costs, (b) stated that only those costs that "result from" an incident are recoverable and indicated in the legislative history that such costs are not to include the base costs for those assets normally available for oil spill response, and (c) expressly allowed for the recovery of attorneys fees in a subrogation claim on behalf of the Oil Pollution Trust Fund ("Fund"), but has omitted attorneys fees from the list of recoverable removal costs in a direct action against a responsible party?

PARTIES' DISCLOSURE STATEMENT

Petitioner Britannia Steam Ship Insurance Association Limited has no parent or nonwholly owned subsidiaries. Petitioner Hyundai Merchant Marine Co., Ltd. has three nonwholly owned subsidiaries: Hyundai Merchant Marine (America), Inc., Hyundai America Shipping Agency, Inc. and Hyundai Intermodal, Inc.

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PRELIMINARY STATEMENT

As it is now interpreted by the Ninth Circuit Court of Appeals, the OPA represents a significant erosion of the constitutional due process rights of a vessel owner or other responsible party whose assets spill or threaten to spill oil in the navigable waters.

Under the OPA, the responsible party is liable for removal costs, including those incurred by the Coast Guard. Yet, the responsible party has no effective and meaningful opportunity to influence, challenge or appeal the Coast Guard's charges. There is no mechanism within the governmental agency itself to do so. The first opportunity the responsible party has is in the district court. There, however, the responsible party is limited to proving the costs were arbitrary and capricious. It cannot ask whether the costs were "prudent, or reasonable, or necessary." That extraordinary level of review in the first adjudication of the costs is not meaningful and it is not constitutional.

The constitutional deprivation inherent in this statutory scheme is exacerbated by the ability of the Coast Guard to pass on to the responsible party, virtually without limit, its administrative costs – some of which would have been incurred even in the absence of the spill or threatened spill. Allowing an administrative agency to pass on all of its response costs takes away any incentive for that agency to act efficiently and responsibly.

OPINIONS BELOW

The decision of the Ninth Circuit Court of Appeals is reported at 172 F.3d 1187 (1999) and is reproduced in the Appendix beginning at page App. 1.

The orders of the United States District Court for the District of Alaska are not officially reported and are reproduced in the Appendix as follows: July 11, 1995 Order for Partial Summary Judgment disallowing the recovery of monitoring costs (App. 15). January 26, 1996 Order of Reconsideration allowing the recovery of monitoring costs (App. 24). January 29, 1996 Order for Partial Summary Judgment requiring a nexus between recoverable costs and the pollution incident (App. 29). The March 31, 1997 Findings of Fact and Conclusions of Law of the District Court (App. 39). The July 28, 1997 Order granting the Government's attorneys fees (App. 72).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1). The decision of the Ninth Circuit Court of Appeals was filed on April 20, 1999. The jurisdiction of the United States District Court for the District of Alaska was based on 28 U.S.C. section 1345 and 33 U.S.C. section 2717(b).

STATUTORY PROVISIONS INVOLVED

The following statutory sections are reproduced in the Appendix beginning at App. 74: 33 U.S.C.

§ 1321(c)(1), (2) and (5); § 2701(4), (30) and (31); § 2702(a) and (b)(1); § 2712(a)(1); § 2715(c).

STATEMENT OF THE CASE

On October 2, 1991, the M/V *Hyundai No. 12*, owned and insured by the Petitioners, HYUNDAI MERCHANT MARINE CO., LTD. and BRITANNIA STEAM SHIP INSURANCE ASSOCIATION LIMITED (collectively "Hyundai") ran aground in an environmentally sensitive area while seeking refuge during a storm. The cargo vessel was successfully refloated by its owner on October 12. Only a small amount of the approximately 200,000 gallons of fuel oil leaked during the incident.

Hyundai immediately accepted responsibility under the OPA and undertook a pollution response effort that cost it approximately $4.5 million dollars, which were not at issue below.

The Coast Guard initially responded through a search and rescue mission and an investigation and assessment by the Federal On Scene Coordinator ("FOSC"). The Coast Guard's role then consisted solely of having additional removal and containment equipment and personnel available and in monitoring and observing Hyundai's efforts. The Coast Guard did no actual clean-up and did not actively participate in the operations, although they were consulted and approved Hyundai's plans and actions.

The Government billed Hyundai $1,109,963 for its costs in connection with Hyundai's removal response operation.

After filing suit against Hyundai to recover the Coast Guard's costs, the Government filed a motion for partial summary judgment asserting that it was entitled to the recovery of all costs incurred. The District Court initially ruled that monitoring costs were not recoverable, but later reconsidered that decision and allowed the recovery of monitoring costs (App. 20; 24). The District Court also ruled that to be recoverable removal costs must bear a sufficient causal "nexus" to the pollution incident (App. 21). Later the Court issued further orders stating that base costs are recoverable, including depreciation (App. 36; 64-66, ¶ 59).[1]

The case was tried to the Court for five days. The Court awarded the Government all of its requested costs, penalties and administrative fees. Judgment in the amount of $1,592,962.90 was entered. In a post-trial ruling, the District Court also awarded the Government its attorneys fees of $104,043.73.

Hyundai appealed to the Ninth Circuit which affirmed all aspects of the award except for penalties awarded under the Debt Collection Act. Hyundai does not seek review of that portion of the Ninth Circuit's opinion.

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[1] The District Court also determined that base costs could be recovered only if the "primary purpose" for which the costs were incurred was monitoring or the containment and removal of oil (App. 66, ¶ 60). Hyundai did not appeal from this finding.

REASONS WHY THIS PETITION SHOULD BE GRANTED

This petition should be granted for four reasons that this Court has traditionally found compelling. First, the decision below and decisions by the Fifth Circuit Court of Appeals are in conflict with decisions by the Third Circuit with regard to the applicability the "NCTA" doctrine of statutory construction to environmental clean-up laws. Second, the decision below interprets the OPA, a statute of nationwide importance. Third, the decision below, because it applies the arbitrary and capricious standard of review in what is the first neutral review of the Coast Guard's charges to a responsible party, violates the responsible party's due process rights. Finally, the Ninth Circuit's interpretation of OPA is at odds with settled axioms of statutory construction.

I.

REVIEW IS NEEDED TO RESOLVE THE CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS AS TO THE APPLICABILITY OF THE "NCTA" DOCTRINE TO THE RECOVERY OF THE GOVERNMENT'S ADMINISTRATIVE COSTS OF MONITORING A PRIVATE PARTY'S ENVIRONMENTAL RESPONSE OPERATION

A. The Third Circuit Court Of Appeals Applies The NCTA Doctrine To Disallow The Government's Recovery Of Its Administrative Costs Incurred In Monitoring A Private Party's Environmental Response.

The NCTA doctrine is a rule of administrative law and statutory construction that takes its name from this Court's decision in *National Cable Television Ass'n v. United*

States, 415 U.S. 336 (1974). According to the doctrine, a statute must clearly indicate Congress' intent to delegate its taxing power to an executive agency before that agency may constitutionally charge administrative costs against a regulated party if that charge does not inure to the benefit of the party. Any ambiguity in a statute purporting to delegate such authority must be resolved against delegation. *Id.* at 1275.

The Third Circuit applied the doctrine in *United States v. Rohm and Haas Co.*, 2 F.3d 1265 (3d Cir. 1993) to disallow the Government's recovery of its costs incurred in overseeing a private removal action under the Resource Conservation and Recovery Act ("RCRA") and CERCLA. The Third Circuit emphasized that the doctrine applied to the levy of administrative costs regardless of whether those costs were termed "taxes" or "fees". The determinative factor in applying the doctrine is that an oversight agency requires a regulated party to pay a share of the administrative costs of its own oversight. *Id.* at 1274. In that case, the Third Circuit refused to impose on the regulated party the EPA's costs of monitoring that party's compliance with the law. *Id.* at 1276.

B. The Fifth Circuit And Now The Ninth Circuit Have Refused To Apply The NCTA Doctrine To The Government's Recovery Of Its Administrative Costs Incurred In Monitoring A Private Party's Environmental Clean-up.

In *United States v. Lowe*, 118 F.3d 399, 401 (5th Cir. 1997), the Fifth Circuit Court of Appeals held that clean-up costs under CERCLA, including monitoring costs,

were neither "taxes" nor "fees" and that, therefore, the NCTA doctrine did not apply. In the case below, the Ninth Circuit agreed with the holding in *Lowe* and allowed the recovery of the Government's administrative costs – including monitoring costs – under the OPA.[2]

A conflict thus exists between the Third and Fifth and now the Ninth Circuits as to the applicability of the NCTA doctrine to costs incurred by the Government in monitoring environmental response operations.

C. Resolution Of This Conflict Is Important Because The Government's Recovery Of Its Administrative Costs Abrogates The Intent Behind OPA To Encourage Responsible Parties To Undertake Response Operations And Provides No Incentive For The Government To Act Economically.

The Third Circuit found the NTCA doctrine to be particularly important in the interpretation of environmental statutes. Emphasizing the need to ensure that governmental agencies act in a cost-effective and efficient manner, the Court refused to narrowly apply the doctrine only to "fees" and "taxes" to the exclusion of environmental removal costs:

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[2] The Tenth Circuit refused to adopt the Third Circuit's analysis of CERCLA in *Atlantic Richfield Co. v. American Airlines, Inc.*, 98 F.3d 564, 568 (10th Cir. 1996). That decision, however, was not a rejection of the NCTA doctrine. Rather, the Tenth Circuit disagreed with the Third Circuit's interpretation of CERCLA.

> The budget and appropriation process gives executive agencies an incentive to operate efficiently and makes them accountable to the Congress. *When an agency asserts the right to secure financing of its activities by assessing its costs against those whom it regulates, that incentive and accountability are lost.*

Rohmand Haas, 2 F.3d at 1274 (emphasis added).

Not only is the agency's accountability lost, so is the regulated party's incentive to undertake its own response to a spill under the OPA. If a responsible party will ultimately be liable not only for its own response bills but also for the Coast Guard's bills in monitoring, what incentive does that party have to undertake anything other than a minimal response? Why wouldn't the responsible party do only as much as it must to avoid the imposition of penalties and then withdraw and let the Coast Guard clean-up the spill? In that way, it will have only one bill to pay – the Coast Guard's – rather than having to pay both for its own response costs and the sometimes parallel and duplicative costs of the Coast Guard in its monitoring function.

The resolution of this issue has implications beyond this case and those cases interpreting the OPA. As the Third Circuit has noted, many environmental statutes anticipate and depend upon private parties' undertaking environmental removal actions. *Id.* at 1276. In fact, forcing "private parties to undertake corrective action at their own expense is a favorite policy tool of Congress . . . " as evidenced by the RCRA, 42 U.S.C. § 6928(h)(1988); the Safe Drinking Water Act, 42 U.S.C. § 3001 (1988); and CERCLA, § 42 U.S.C. § 9601 (1988). *Id.* at fn. 18. To

continue to allow the Government a blank check in overseeing private clean-up operations is to undermine those statutes which encourage private parties' undertaking their own environmental clean-up operations.

D. Resolution Of This Conflict Is Particularly Significant In Environmental Cases Because The Government Has Been Allowed To Recover Its Indirect Costs Which Would Be Incurred Even In The Absence Of A Pollution Incident.

In addition to its monitoring costs, the Government has been allowed to recover its base costs from Hyundai (App. 64-66, ¶ 57). Base costs are those costs, such as personnel salaries, administrative overhead and depreciation costs that would have been incurred even in the absence of a pollution incident. In allowing this item of recovery, the Ninth Circuit articulated no limitation. The danger such unlimited recovery poses is that a responsible party could, potentially, be liable not only for an allocated portion of the salaries of the crew who in fact attended to the incident, but also for the myriad on-shore supervisors and their staff – conceivably all the way up the chain of command to the executive office – who oversaw even remote aspects of the pollution response.

In this way, the Government has been given free reign to pass on significant administrative costs to a responsible party with absolutely no budgetary incentives to act efficiently.

II

REVIEW IS WARRANTED BECAUSE THE NINTH CIRCUIT'S AWARD OF ALL COSTS TO THE GOVERNMENT REGARDLESS OF WHETHER THEY ARE "PRUDENT, OR NECESSARY, OR REASONABLE" IS UNCONSTITUTIONAL GIVEN THAT THE DISTRICT COURT TRIAL IS THE FIRST OPPORTUNITY A RESPONSIBLE PARTY HAS FOR A REVIEW OF EXPENDITURES.

The Ninth Circuit held that the Government need not demonstrate that any particular cost is "prudent, or necessary, or reasonable" in order to recover that cost from the responsible party (App. 9). The only applicable standard is whether the actions taken by the Coast Guard were nonarbitrary and not capricious under the Administrative Procedure Act ("APA") (App. 10). Because Hyundai had no prior opportunity to challenge the Coast Guard's cost bill, however, the application of the arbitrary and capricious standard by the District Court without regard to whether the costs were necessary, deprived Hyundai of meaningful review in violation of its constitutional right to due process.

The Ninth Circuit adopted the arbitrary and capricious standard of review from the APA (App. 10). The APA, however, employs the arbitrary and capricious standard to describe the standard of review applied by a reviewing court to final agency actions. 5 U.S.C. §§ 107, 706; *United States v. Attati & Goss, Inc.*, 900 F.2d 429 (1st Cir. 1990). The actions by the FOSC, however, are not "final agency actions". *See, e.g., Conoco, Inc. v. United States*, 1994 WL 24249, *2 (E.D. La., 1994).

Most significantly, the OPA provides no mechanism for a responsible party to seek Coast Guard review of the FOSC's decisions. Once the FOSC makes the decision to incur a specific cost, the cost is passed on to the Pollution Fund Center, which then formulates and presents the demand for payment to the responsible party. A primary concern of the Fund is to maximize the recoupment of costs in order to replenish the Fund. *See*, H.R. Rep. No. 653, 101st Cong. 2d Sess. at 112-114 (1990), *reprinted in* 1990 U.S.C.C.A.N. 779, 790-92; National Pollution Funds Center Annual Report FY94, 1995 at 20, n. 7. The lawsuit by the Government against the responsible party to recoup the costs incurred by the FOSC is the first time that the FOSC's actions are subject to review. Deferring to the FOSC's decisions by applying the arbitrary and capricious standard during that initial review deprives the responsible party of meaningful review.[3]

This Court has recognized the danger of undue deference to agency decisions during the first level of review in cases outside of the environmental context. In the context of a revocation of a medical license, for example, this Court stated:

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[3] The Government has argued that Hyundai conceded to the District Court that the FOSC's actions should be reviewed under an arbitrary and capricious standard. Hyundai, however, did argue to the Ninth Circuit that the application of the arbitrary and capricious standard without the further de novo consideration of whether a cost was necessary was unconstitutional.

> Clearly, if the initial view of the facts based on the evidence derived from nonadversarial processes as a practical or legal matter foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision, a substantial due process question would be raised.

Withrow v. Larkin, 421 U.S. 35, 58 (1975).

Likewise, in *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 (1993), this Court explained that an agency action that is essentially non-adjudicative in character cannot, as a constitutional matter, be afforded deference during the initial review by a neutral adjudicator. Rather, in that circumstance, the action must be reviewed de novo. Where the first neutral adjudicator to review the agency action is required to defer to the agency, due process is violated.

In the context of this case, the District Court should have reviewed the FOSC's actions for more than mere arbitrariness and capriciousness. As urged by Hyundai to the Ninth Circuit, the District Court should also have determined whether each cost was also necessary.

III

THE NINTH CIRCUIT'S INTERPRETATION OF THE OPA VIOLATES LONG-SETTLED AXIOMS OF STATUTORY CONSTRUCTION

A. The Award Of Monitoring Costs Is Not Supported By The OPA.

A vessel that discharges oil or threatens to discharge oil into national waters is strictly liable for removal costs under the OPA as a responsible party. 33 U.S.C. §§ 2701(32), 2702(a). The term "removal costs" as defined in OPA does not include monitoring costs:

> 'Removal costs' *means* the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from such an incident. . . .

33 U.S.C. § 2701(31) (emphasis added).

The term "removal" in turn is defined as:

> 'Remove' or 'removal' *means* containment and removal of oil or a hazardous substance from water and shorelines or the taking of other actions as may be necessary to minimize or mitigate damage to the public health or welfare . . .

33 U.S.C. § 2701(30) (emphasis added).

Fundamental to statutory construction is the rule that a statute's "definition which declares what a term 'means' . . . excludes any other meaning that is not stated." *Coluatti v. Franklin*, 439 U.S. 379, 392, n. 10 (1979). Because the term "removal costs" is not said to "mean"

monitoring costs, those charges should not have been allowed.

This conclusion is mandated by the fact that the OPA does distinguish between "removal costs" and "monitoring costs" in another of its sections. Specifically, the section outlining the uses of the Fund states that it may be used for the payment of "removal costs, including the costs of monitoring removal actions. . . . " 33 U.S.C. § 2712(a)(1).

" '[I]t is generally presumed that Congress acts intentionally and purposely' when it 'includes particular language in one section of a statute but omits it in another . . . ' " *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338 (1994). Where Congress intended to include monitoring costs in the OPA, it did so. Because it did not include monitoring costs in the list of recoverable "removal costs", it must be presumed to have intended to exclude them.

B. The Award Of Base Costs Is Not Supported By The OPA.

The OPA states that a responsible party is liable for those removal costs that "result from" a pollution incident. 33 U.S.C. § 2702(a). Those base costs which the Coast Guard would incur even in the absence of an oil spill, such as routine salaries and depreciation or capital costs do not "result from" the incident and are not recoverable. The House Conference Report itself states that "both incremental and base costs should be included,

except for persons normally available for oil spill response, when calculating the costs of Federal efforts to respond to a spill. H.R. Conf. Rep. No. 101-653, 101 Cong. 2d Sess. 114 (1990) (emphasis added).

C. An Award Of Attorneys Fees Is Not Allowed By The OPA In Direct Actions Against The Responsible Party.

The OPA expressly allows for the recovery of attorneys fees in subrogation claims brought on behalf of the Fund but does not expressly allow for the recovery of attorneys fees in direct claims brought against a responsible party. The Ninth Circuit disregarded that express distinction and allowed the Government to recover its attorneys fees in the case below even though that case was a direct action as opposed to a subrogation claim. The Ninth Circuit did so without any support in the statute itself, instead allowing recovery simply because the Coast Guard and the Fund are both part of the Government (App. 12).

Under the OPA, a claimant – defined as "any person *or government*" – may sue the responsible party directly or seek compensation from the Fund. 33 U.S.C. §§ 2701(4), 2713(c) (emphasis added). In a direct action, the claimant may recover against a responsible party for "removal costs" and "damages." The definitions of "removal costs" and "damages" do not include attorneys' fees. 33 U.S.C. § 2702(b)(1) and (2).

A person or government as a "claimant" may also elect to present the claim to the Fund. 33 U.S.C. § 2713(c). In that case the secretary is authorized to commence an

action on behalf of the Fund to recover compensation paid by the Fund to the claimant. It is in that action that attorneys' fees are expressly provided for:

> At the request of the Secretary, the Attorney General shall commence an action on behalf of the Fund to recover any compensation paid by the Fund to any claimant pursuant to this chapter, and all costs incurred by the Fund by reason of the claim, including interest (including prejudgment interest), administrative and adjudicative costs, and attorneys' fees. Such an action may be commenced against any responsible party . . . for the costs or damages for which compensation was paid. . . .

33 U.S.C. § 2714(c).

" '[I]t is generally presumed that Congress acts intentionally and purposely' when it 'includes particular language in one section of a statute but omits it in another . . . ' " *Chicago v. Environmental Defense Fund*, 511 U.S. 328 (1994). The Ninth Circuit, therefore, should have presumed that because Congress included the recovery of attorneys fees in the subrogation claim but did not include mention of attorneys fees in the direct claim, it intended that in actions such as this one, the Government was not entitled to recover attorneys fees.

CONCLUSION

For these reasons, Petitioners request that this Court grant this Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals.

Respectfully submitted,

DAWN M. SCHOCK
Counsel of Record
MICHAEL H. WOODELL
DOUGLAS R. DAVIS
KEESAL, YOUNG & LOGAN
A Professional Corporation
400 Oceangate
Post Office Box 1730
Long Beach, California 90801-1730
Telephone (562) 436-2000

Attorneys for Petitioners
HYUNDAI MERCHANT MARINE COMPANY, LTD. and BRITANNIA STEAM SHIP INSURANCE ASSOCIATION LIMITED

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. HYUNDAI MERCHANT MARINE CO., LTD.; BRITANNIA STEAM SHIP INSURANCE ASSOCIATION, LTD., *Defendants-Appellants.*	Nos. 97-35538 97-35820 D.C. No. CV-94-00391-HRH OPINION

Appeals from the United States District Court
for the District of Alaska
H. Russel Holland, District Judge, Presiding

Argued and Submitted
July 9, 1998 – Seattle, Washington

Filed April 20, 1999

Before: William C. Canby, Jr. and A. Wallace Tashima, Circuit Judges, and David A. Ezra,[1] Chief District Judge.

Opinion by Judge Canby

---

[1] The Honorable David A. Ezra, Chief United States District Judge for the District of Hawaii, sitting by designation.

COUNSEL

Dawn M. Schock, Keesal, Young & Logan, Long Beach, California, for the defendants-appellants.

R. Michael Underhill, United States Department of Justice, Torts Branch, Civil Division, San Francisco, California, for the plaintiff-appellee.

OPINION

CANBY, Circuit Judge:

Hyundai Merchant Marine Co. appeals from a $1,702,553.51 damage award to the United States pursuant to the Oil Pollution Act of 1990 ("OPA"), 33 U.S.C. §§ 2701-2761. The OPA provides that a party responsible for a vessel that discharges or threatens to discharge oil into navigable waters is liable for "removal costs and damages," *id.* § 2702(a), including removal costs incurred by the United States. *Id.* § 2701(b)(A). This appeal concerns the permissible scope of the United States' recovery under the OPA for its response to a private party's threatened (and to a limited degree, actual) oil spill, a question of first impression in this and all circuits. With but one exception, we agree with the district court that the United States is entitled to recover the amounts it claimed.

I. Facts

On October 2, 1991, the bulk carrier M/V Hyundai No. 12 ran aground in the Shumagin Islands of Alaska, an environmentally sensitive area approximately 260 miles

west of Kodiak. The freighter was carrying almost 200,000 gallons of bunker oil in its bottom fuel tanks. This type of oil has a molasses-like consistency and must be heated to be pumped. It evaporates slowly, if at all, and disperses poorly when exposed to the elements.

Hyundai's crew soon discovered that each of the ship's tanks was fractured and open to the sea. On the fifth and sixth days after the grounding, a gale force storm twisted and swung the ship more than 100 degrees around the rocks on which it was perched, leading to oil leakage visible in a sheen over 2000 feet long. This oil spill threatened several species of wildlife.

The Coast Guard responded to the initial emergency at once. For eleven days immediately following the grounding, it stood ready with men and equipment to contain a major spill and monitored Hyundai's efforts to free the ship. Hyundai, however, performed the actual work of containing the spill and freeing the ship, at great expense to itself. It consulted with the Coast Guard, and the Coast Guard approved its plan of operation. Fortunately, only minor spillage occurred before Hyundai was able to free the ship and tow it to repair docks.

The United States sued under the OPA to recover its costs from Hyundai for the Coast Guard's response to the emergency. The district court awarded the United States $1,702,553.51. Hyundai and its insurer, although recognizing a duty to reimburse the United States for certain limited costs, appeal several aspects of that award. The crux of Hyundai's argument is that a responsible party that spends millions of dollars in a successful prevention and cleanup operation should not have to reimburse the

United States for efforts that were duplicative and unnecessary. In this vein, Hyundai contends that (1) the United States was not entitled to recover monitoring costs; (2) only "necessary" costs are recoverable; and (3) "base" costs are not recoverable. Hyundai also argues that (4) penalties should not have been assessed under the Debt Collection Act, 31 U.S.C. § 3717; (5) the United States was not entitled to attorneys' fees; and (6) the Coast Guard improperly applied a later-imposed rate schedule when calculating its costs. We agree with Hyundai that the Debt Collection Act and its penalties do not apply in this case. We reject, however, all of Hyundai's remaining contentions.

II. Costs of Monitoring

Hyundai contends that the OPA does not allow the United States to recover the Coast Guard's cost of monitoring Hyundai's salvage operation, as opposed to the cost of actual removal of oil. According to Hyundai, costs of monitoring do not constitute "removal costs." We reject Hyundai's interpretation of the statute; the definition of "removal" costs under 33 U.S.C. § 2702(a) includes monitoring costs.

OPA § 2702(a) provides:

> [E]ach responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters . . . *is liable for the removal costs* and damages specified in subsection (b) that result from such incident.

(Emphasis added.)

Subsection (b) then provides:

> The removal costs referred to in subsection (a) of this section are –
>
> (A) all removal costs incurred by the United States . . . under subsection (c), (d), (e), or (1) of section 1321 of this title . . .

33 U.S.C. § 2701(b). The reference to section 1321 is to the Federal Water Pollution Control Act, 33 U.S.C. §§ 1321(c)-(e) and (1). Section 1321(c) of that Act is of particular relevance here. It directs the President to "ensure effective and immediate removal of discharge, and mitigation or prevention of a substantial threat of discharge, of oil" into United States waters. 33 U.S.C. § 1321(c)(1)(A). It further provides that, in carrying out those duties, the President may:

> (i) remove or arrange for the removal of a discharge, and mitigate or prevent a substantial threat of a discharge, at any time;
>
> (ii) *direct or monitor* all Federal, State, and private actions to remove a discharge. . . .

33 U.S.C. § 1321(c)(1)(B)(i),(ii) (emphasis added). Finally, subsection (c) provides that, when a "discharge or substantial threat of a discharge" of oil is of a size or character to be a substantial threat to the health or welfare of the United States (including a threat to fish or wildlife), then:

> The President shall direct all Federal, State, and private actions to remove the discharge or to mitigate or prevent the threat of the discharge.

33 U.S.C. § 1321(c)(2)(A).

As we read these cross-referenced provisions of the OPA and the Federal Water Pollution Control Act, they entitle the United States to recover the costs incurred by the Coast Guard in monitoring Hyundai's removal of its stranded and leaking vessel holding 200,000 gallons of bunker fuel. The Coast Guard's actions were an attempt to "mitigate or prevent a substantial threat of a discharge," § 1321(c)(1)(B), it was "monitoring . . . private action to remove a discharge," § 1321(c)(1)(B)(ii), and its monitoring was a means of "direct[ing] private actions to remove the discharge or to mitigate or prevent the threat of discharge" of oil, § 1321(c)(2)(A).[2]

In addition to the cross-references to the Federal Water Pollution Control Act, the general definition section of the OPA supports our conclusion. That section defines "removal costs" as:

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[2] We reject Hyundai's contention that denial of reimbursement for monitoring costs is supported by H.R. Conf. Rep. No. 101-653, 101st Cong., 2d Sess. 145 (1990). That report states:

> With respect to removal of any discharge or mitigation or prevention of any substantial threat of a discharge, the President may assume responsibility and costs of these actions subject to reimbursement from the responsible party; (i.e., "federalize the effort"); direct or monitor all Federal, State and private actions; and remove and, if necessary, destroy a vessel discharging or threatening to discharge.

Hyundai contends that "subject to reimbursement" applies only to the first clause. We do not read the statement that way; it is more reasonable to apply the clause to the entire sentence. It is doubtful, for example, that Congress intended not to permit reimbursement for the removal or destruction of a vessel by the United States.

> the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the *costs to prevent, minimize, or mitigate* oil pollution from such an incident.

33 U.S.C. § 2701(31) (emphasis added). We reject Hyundai's contention that this definition excludes monitoring; the Coast Guard's monitoring activities are part of its effort to prevent or minimize a threatened oil discharge. Hyundai's reliance on the narrower definition of "removal" in § 2701(30) is of no avail; that definition does not include prevention. The broader definition of "costs of removal" in § 2701(32) includes costs of prevention. Hyundai's emphasis on actual removal unduly minimizes the importance of the Coast Guard's emergency stand-by operation, which qualifies as an act of "prevention," the cost of which is clearly recoverable under the terms of the definition as it applies to the liability imposed by § 2702.[3]

Finally, Hyundai challenges the assessment of monitoring costs on the basis of *National Cable Television Ass'n. v. United States*, 415 U.S. 336 (1974). There, the Court reminded Congress that it may not delegate away its taxing power to an executive agency, *see id.* at 342. *See also Union Pacific R.R. v. Public Util. Comm'n*, 899 F.2d 854, 860

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[3] We reject Hyundai's contention that the explicit reference to removal and monitoring costs in § 2712(a)(1) indicates that removal cost ordinarily does not include monitoring cost. Section 2712(a)(1) authorizes use of the Oil Spill Liability Trust Fund for "the payment of removal costs, including the costs of monitoring removal actions." This section does not refer to removal and monitoring as separate activities; indeed the term "including" suggests that monitoring cost is a removal cost.

(9th Cir. 1990). These cases do not apply here. The OPA authorizes recovery of costs, not taxation. Cf. *United States v. Lowe*, 118 F.3d 399, 401 (5th Cir. 1997) (recovery of CERCLA clean up costs is neither a fee nor a tax).

III. "Necessary" Costs

Hyundai contends that the United States may not recover costs unless the district court determines they were "necessary" to mitigate or prevent a discharge of oil. It bases its argument on § 2701(30), which defines "remove" and "removal" for the OPA as follows:

> 'Remove' or 'removal' means containment and removal of oil or a hazardous substance from water and shorelines or the taking of other actions *as may be necessary* to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches.

(Emphasis added.) Hyundai concludes that actions other than actual removal must be deemed "necessary" before they are compensable. We reject this contention.

First, the words "as may be necessary" do not purport to be a limitation on reimbursement. They are more naturally read as an acknowledgment of executive discretion in determining the steps a particular situation requires. In any event, as we explained above, the relevant term in § 2702(a) is "removal costs," not "removal." The former is defined at subsection (31) as the "costs to prevent, minimize, or mitigate oil pollution." The word

"necessary" is nowhere to be found in this more pertinent definition.

Finally, if Congress were to establish a standard for establishing which actions of the Coast Guard were reimbursable, one would expect to find it in the liability portion of the statute, not in the definitions section. The liability section, § 2702(b), specifies what removal costs are recoverable under § 2701(a). It defines them as *"all* removal costs incurred by the United States." (Emphasis added.) Nothing in the liability section limits the United States to recovery of "necessary" removal costs.

Hyundai argues that the United States should not have a blank check permitting it to undertake all kinds of unnecessary and unreasonable actions at Hyundai's expense. It is worth pointing out in passing, however, that many of the actions that Hyundai now regards as unreasonable or unnecessary appear so, if at all, only by hindsight. The grounding of the Hyundai No. 12 contained the seeds of a major ecological disaster. In the circumstances, it was only prudent for the government to rush personnel and equipment to the scene and maintain them there until the threat was over. Be that as it may, the OPA does not restrict the recovery of the United States to costs that were prudent, or necessary, or reasonable.[4]

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[4] Under the Federal Water Pollution Control Act, incorporated in part by OPA § 2702(b), the government has been held to be entitled to recover *all* of its costs of removal, with no requirement of necessity or reasonableness. *See Puerto Rico v. SS ZOE COLOCOTRONI*, 456 F.Supp. 1327, 1347 (D.P.R. 1978), *aff'd in part, vacated in part on other grounds*, 628 F.2d 652 (1st Cir. 1980), *cert. denied*, 450 U.S. 912 (1981); *Union Petroleum Corp. v. United States*, 651 F.2d 734, 744 (Ct. Cl. 1981).

Recovery under the OPA is not wholly unlimited, however. The government concedes that the general standard of the Administrative Procedures Act applies to its actions in seeking to prevent or contain an oil-spill disaster: the United States may recover its costs unless its actions were arbitrary or capricious. *See* 5 U.S.C. § 706(2)(A). The district court held that the actions of the United States for which it awarded recovery were not arbitrary or capricious. Hyundai does not challenge these rulings. The OPA does not authorize the imposition of any higher standard.

IV. Base Costs

Hyundai contends that the Coast Guard's base costs, as opposed to its incremental costs, are not recoverable. Base costs are those costs, such as the salaries of personnel, that the Coast Guard would have incurred even were it not responding to the Hyundai No. 12's distress. Hyundai relies on the OPA's language to the effect that the government may recover costs that "result from" an oil spill. 33 U.S.C. § 2701(a). It thus contends that paying the personnel who respond to an incident, for example, is not a cost that "results from" the incident.

We reject this interpretation of the OPA. The Coast Guard's allocable base costs did "result from" the incident. If personnel must be sent to monitor a potential spill, they must be paid. The fact that, if this near-disaster had not occurred, the personnel would have been paid to perform some other task does not alter the reality that the mishap did occur and Coast Guard personnel were paid to monitor a potential spill. While they were monitoring

operations for the Hyundai No. 12, Coast Guard personnel could not carry out their other duties, such as safety inspections and drug interdiction. The same point may be made with regard to other assets employed by the Coast Guard in responding to this accident. Base costs represent real costs to the United States and are recoverable to the extent they are allocable to a response to an oil spill. Nothing in the OPA provides to the contrary.

V. Debt Collection Act Penalties

The district court awarded the United States interest prescribed by the OPA and penalties prescribed by the Debt Collection Act, 31 U.S.C. § 3717. Hyundai contends that when a statutory cause of action sets its own rate of interest, the Debt Collection Act does not apply. We agree.

It is undisputed that the OPA provides for interest, but not penalties. 33 U.S.C. § 2705. On the other hand, the Debt Collection Act provides for both interest and penalties on a claim due the United States, 31 U.S.C. § 3717(a)(1),(e), but it also specifies that the section containing those provisions "does not apply if a statute . . . explicitly fixes the interest *or* charges." *Id.*, § 3717(g)(1) (emphasis added). We apply as written the disjunctive "interest or charges." Because the OPA fixes interest, § 3717 "does not apply" and neither interest nor penalties may be collected under it. We therefore reverse this portion of the district court's award, and remand for modification of the judgment accordingly.

VI. Attorneys' Fees

Funds recovered for removal costs are paid to the Oil Spill Liability Trust Fund, which is available to the President for the payment of removal costs. *See* 33 U.S.C. §§ 2706(f), 2712(a)(1). Fees were awarded here pursuant to § 2715(c), which provides in relevant part:

> At the request of the Secretary, the Attorney General shall commence an action on behalf of the Fund to recover any compensation paid by the Fund to any claimant pursuant to this chapter, and all costs incurred by the Fund by reason of the claim, including . . . attorney's fees.

Although Hyundai does not dispute that the recovery in this case will be paid into the Fund, it contends that the government cannot recover fees because it is not clear that the Fund itself is suing as a subrogee. Hyundai latches onto the phrase "compensation paid by the Fund," arguing that no attorneys' fees are due to the United States unless the Coast Guard first was compensated by the fund for its removal costs.

The Coast Guard and the Fund are both part of the federal government. This action is necessarily brought on behalf of the Fund because the recovery will go to the Fund. It was clearly Congress's purpose that the United States be reimbursed its attorneys' fees when it must sue for such a recovery. That purpose would be frustrated if recovery of fees was defeated by the happenstance that, as a matter of accounting, the Fund paid for the removal costs after, rather than before, the claim against the responsible party was litigated. The district court did not misread the statute in awarding the United States attorneys' fees.

VII. The Rate Schedule

The Coast Guard first billed Hyundai pursuant to Commandant Instruction 7310.1D, but later applied the higher rates of Commandant Instruction 7310.1E. The government asserts that Instruction E superseded Instruction D on July 13, 1991, over two months before the Hyundai No. 12's grounding on October 2.

Instruction E is stamped July 13, 1991, and it indicates that it supersedes Instruction D. Hyundai points to § 4(a) of Instruction E, which states that "[t]he enclosed rates are effective upon receipt." Hyundai contends that there is no proof that Instruction E actually was received before the Hyundai No. 12 ran aground.

The Coast Guard argues that the routing block and matrix at the bottom of the first page of Instruction E proves that it was sent to the Juneau Coast Guard Station (which responded to the Hyundai No. 12 accident) on or about July 13. This documentation was sufficient to support the district court's ruling that Instruction E was in effect by the time of the grounding of Hyundai No. 12. *Cf. In re Buckmun*, 951 F.2d 204, 206 (9th Cir. 1990) (properly addressed and dispatched mail is presumed to be delivered).

VIII. Conclusion

The district court did not err in awarding the United States its removal costs, including both incremental and base costs of monitoring the threatened and actual oil spill of the Hyundai No. 12, calculated in accord with Instruction E. The district court also properly awarded

the United States its attorneys' fees. The district court did err, however, in assessing penalties under the Debt Collection Act. We therefore affirm all of the award except the penalties under the Debt Collection Act, which we reverse. The matter is remanded to the district court for correction of its judgment in that respect.

The United States is awarded its costs on appeal.

In No. 97-35820, the district court's order awarding attorneys' fees is **AFFIRMED.**

In No. 97-35538, the judgment is **AFFIRMED in part; REVERSED in part; and REMANDED.**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, vs. HYUNDAI MERCHANT MARINE COMPANY, LTD., BRITANNIA STEAM SHIP INSURANCE ASSOCIATION, LTD., SHERBET HOLDING CORP., and EUROBAHIA OVERSEA CORP., *in personam*, and M/V HYUNDAI NO. 12, *in rem*, Defendants.	No. A94-0391 CV (HRH) ORDER (Motion for Partial Summary Judgment) (Filed Jul. 11, 1995)

Plaintiff United States ("the government") has moved for partial summary judgment.[1] This motion is opposed.[2] Oral argument has been heard.

On October 12, 1991, the M/V HYUNDAI No. 12 grounded near the Shumagin Islands. A tear developed in the hull, leading to the possibility of a fuel spill. The vessel was carrying 200,000 gallons of fuel. A federal response was undertaken and various federal entities, most notably the Coast Guard, were dispatched to the

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[1] Clerk's Docket No. 17.

[2] Clerk's Docket No. 22.

scene. A small amount of fuel escaped the hull of the M/V HYUNDAI.

The government brought suit under the Oil Pollution Act ("OPA") of 1990. The parties differ over two issues which involve interpretations of OPA. The first issue is whether monitoring costs are recoverable by the United States. The second issue concerns removal costs. This court will first address the monitoring issue.

Monitoring

OPA definitions include the following:

> (30) "remove" or "removal" means containment and removal of oil or a hazardous substance from water and shorelines or the taking of other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches;
>
> (31) "removal costs" means the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from such an incident[.]

33 U.S.C. § 2701(30-31). OPA states in pertinent part:

> (a) In general
>
> Notwithstanding an other provision or rule of law, and subject to the provisions of this chapter, each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil,

into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages specified in subsection (b) that result from such incident.

(b) Covered removal costs and damages

(1) Removal costs

The removal costs referred to in subsection (a) of this section are –

(A) all removal costs incurred by the United States, a State, or an Indian tribe under subsection (c), (d), (e), or (1) of section 1321 of this title, as amended by this Act, under the Intervention on the High Seas Act (33 U.S.C. 1471 et seq.), or under State law. . . .

33 U.S.C. § 2702(a), (b)(1)(A).

The Federal Water Pollution Control Act ("FWPCA"),[3] subsection 1321(c) was amended as part of OPA, *see* Pub. L. 101-380, it states in pertinent part:

(c) Federal removal authority

(1) General removal requirement

(A) The President shall, in accordance with the National Contingency Plan and any appropriate Area Contingency Plan, ensure effective and immediate removal of a discharge, and mitigation or prevention of a substantial threat of a discharge, of oil or a hazardous substance –

(i) into or on the navigable waters;

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[3] Also known as the "Clean Water Act".

(ii) on the adjoining shorelines to the navigable waters;

(iii) into or on the waters of the exclusive economic zone; or

(iv) that may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States.

(B) In carrying out this paragraph, the President may –

(i) remove or arrange for the removal of a discharge, and mitigate or prevent a substantial threat of a discharge, at any time;

(ii) direct *or monitor* all Federal, State, and *private actions* to remove a discharge. . . .

33 U.S.C. § 1321(c) (emphasis added).

The government asserts monitoring is a section 1321(c) activity and that such costs can be recovered under OPA, § 2702(b). The government points to the legislative history of OPA. The legislative history of section 1321(c), section 4201 of OPA, states in pertinent part:

> [This provision] establishes a general requirement under new section [1321(c)(1)] of the FWPCA that the President ensure effective and immediate removal of a discharge, and mitigation or prevention of a substantial threat of a discharge, of oil or hazardous substances into or on the navigable waters or the waters of the Exclusive Economic Zone, on adjoining shorelines, or that may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United

> States. With respect to removal of any discharge or mitigation or prevention of any substantial threat of a discharge, the President may assume responsibility and costs of these actions subject to reimbursement from the responsible party (i.e., "Federalize" the effort); direct or monitor all federal, State and private actions; and remove and, if necessary, destroy a vessel discharging or threatening to discharge.

H.R. Rep. No. 653, 101st Cong., 2nd Sess. at 145 (1990), *reprinted in* 1990 U.S.C.C.A.N. 722, 824. The government also points to *Conoco Inc. v. United States*, No. 93-3080, 1994 WL 24249 (E.D. La. 1994).[4]

In *Conoco*, an oil company, Conoco, sought review under the Administrative Procedures Act ("APA") of actions taken by the government under OPA. *Id.* at 1. Conoco sought declaratory relief that certain costs were not recoverable under OPA. *Id.*

The district court held review was not possible under the APA since there was no final agency action. *Id.* Despite having decided the matter on the grounds of the APA, the district court discussed the merits of Conoco's claims. The district court stated:

> [Conoco] contends that by including a definition of "removal" and "removal costs" in the definitional provisions of the OPA, 33 U.S.C. §§ 2701(30) & (31), "Congress was trying to protect responsible parties from arbitrary assessments labeled as removal costs." However, this conclusory assertion fails to convince me that

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[4] This document is found in the government's motion for summary judgment, Appendix A, Clerk's Docket No. 17.

> Congress, in enacting the definitional provisions, intended to protect the interests of the responsible party. Nor am I convinced that the relevant definitions are insufficiently broad to contemplate the interpretation urged by the government or to preclude reference to other provisions that more specifically define "removal costs" which the United States government, as a claimant, may recover.

Id. at 3 (footnotes omitted).

Defendants assert the above *Conoco* quotation is dicta and claims allowing monitoring costs would expand the definition of both removal and removal costs found at sections 2701(30) & (31). Defendants assert monitoring costs are not included in this definition and claim this court should not read them into the definition. This court agrees.

Congress clearly distinguished removal and monitoring activities and costs. The definitions of sections 2701(30) & (31) address removal matters only and do not include monitoring. Subsection 2702(a) states a responsible party "is liable for the removal costs . . . specified in subsection (b). . . . " 33 U.S.C. § 2702(a). Subsection 2702(b) states removal costs recoverable include subsection 1321(c) removal costs. Monitoring, like removal, is a subsection 1321(c) activity, but that does not make monitoring a "removal cost". Congress limited the recovery to removal costs. Other activities do not generate recoverable costs merely due to their inclusion in subsection 1321(c).

Nothing in the legislative history suggests a contrary result. The President has the power to "Federalize"

potential spills, but only removal costs can be recovered. This court is aware of the *Conoco* opinion and respectfully disagrees. The portion of the government's motion seeking partial summary judgment on this issue is denied.

Removal

The parties agree that OPA, § 2702(b)(1)(A), allows the government to recover all removal costs, not just reasonable removal costs. *See, United States v. Northeastern Pharmaceutical & Chemical Co., Inc.*, 810 F.2d 726, 748 (8th Cir. 1986). Defendants, however, wish to reserve numerous issues about how the government determines what should be a removal cost. The government seems to assert that defendants can not contest any cost the government assigns to this spill. Government's reply at 1-4, Clerk's Docket No. 26.

Subsection 2702(b)(1)(A) states "all removal costs" may be recovered, it does not state "all costs" may be recovered. Surely if the Coast Guard were to claim its entire operating budget for all its removal operations as costs for this spill defendants could challenge that. Were this court to accept the government's position, however, defendants could not challenge those costs. The government appears to take a "trust us" approach. There must be some operating definition of "all removal costs". There must be some mechanism for challenging the inclusion of certain costs as removal costs. Mere reliance on the government's goodwill is not sufficient.

The court holds that there must be a nexus between a claimed cost and the underlying oil spill. It is currently

unclear to the court whether it should employ a proximate cause concept, a "some evidence" – arbitrariness APA concept,[5] or something even less such as a "good faith" assertion on the part of the government. This court is not prepared to rule on this issue at this time as the parties' briefings on this issue did not adequately explore the matter.

The portion of the government's motion seeking clarification that it is entitled to "all removal costs" is deferred for further briefing from the government on or before July 26, 1995, and from defendants on or before August 10, 1995, unless this portion of the government's motion is rendered moot by the court's ruling on the monitoring issue.

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[5] In *Conoco*, the district court for the Eastern District of Louisiana held there was no standing under the APA for an entity which had admitted responsibility and was presented with a bill by the Coast Guard. The District Court in *Conoco* stated "the responsible party may challenge a claimant's interpretation of the OPA in the event the claimant files an action against the responsible party to recover removal costs and/or damages." *Conoco inc. v. United States*, No. 93-3080, 1994 WL 24249 at 2 (E.D.La. 1994). The District Court held that such a remedy defeats a responsible party's standing to seek review under the APA. *Id.*

A responsible party may claim an act of God, and act of war, or an act or omission of a third party caused the spill and the responsible party may therefore avoid paying removal costs. 33 U.S.C. § 2703. This provision, however, does not solve the problem of providing an allegedly responsible party a mechanism for challenging the inclusion of nonremoval costs in a cost request.

DATED at Anchorage, Alaska, this 11 day of July, 1995.

H. Russel Holland
United States District Judge

A94-0391–CV (HRH)

M. WOODELL
R. BUNDY (US-ATTNY)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, vs. HYUNDAI MERCHANT MARINE CO., LTD., et al., Defendants.	)	No. A94-0391-CV (HRH)

ORDER

(Filed Jan. 26, 1996)

Motion for Reconsideration

Plaintiff has moved for reconsideration[1] of that portion of the court's order of July 11, 1995,[2] which dealt with the recovery of monitoring costs under the Oil Pollution Act of 1990 ("OPA"). The motion is opposed. Oral argument has not been requested and is not deemed necessary.

In the court's order of July 11, 1995, the court in substance held that recoverable costs under OPA did not include monitoring costs.

The court has determined that reconsideration is necessary on the basis of the additional briefing now

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[1] Clerk's Docket No. 32.

[2] Clerk's Docket No. 31.

received. Notwithstanding the superficial attraction of defendants' straightforward argument for the enforcement of the statutory definitions of "remove" and "removal costs" contained in OPA,[3] the court is now convinced that the rather convoluted provisions of OPA more probably than not were intended by Congress to be interpreted in the fashion which the United States Coast Guard has interpreted OPA, and as argued here by the government.

As previously set forth at length in the July 11, 1995, order, the statutory definitions of "remove" and "removal costs"[4] make no express provision for the inclusion of monitoring costs. Why Congress would go to the trouble to define these terms and then bollix the definition by the terms of other sections of OPA, is a frustrating mystery to the court. In Section 1012 of OPA, it is provided that the statutory fund created by Congress is available for "the payment of removal costs, including the costs of monitoring removal actions[.]"[5] It would indeed be incongruous, as suggested by the government, for Congress to imply as quoted above that removal costs include monitoring costs, to provide that both be paid out of the Fund, yet limit the recovery of removal costs from responsible parties by reference to the statutory definition of the same. To put the same proposition somewhat differently, it is incongruous to suggest that removal costs are recoverable from a responsible party, but monitoring costs are not thusly recoverable, even though both are payable out of

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[3] 33 U.S.C. § 2701(30) and (31).

[4] *Id.*

[5] 33 U.S.C. § 2712(a)(1).

the Fund. That said, the court can conceive of reasons why the latter sort of distinction might have been made by Congress. Congress could have been of the view that responsible parties should pay the actual costs of clean-up, but that asking responsible parties to also absorb the government's cost of watching the clean-up was too much. There is little indication that Congress was of this view.

As the government points out, the court is required to consider legislative acts as a whole when interpreting them, *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991), and, that done, the government's interpretation seems to the court now to be the one more likely intended by Congress. In this latter regard, the court has had specific reference to the fact that OPA states the general proposition that responsible parties must pay "damages specified in subsection (b) that result from such incident."[6] Subsection (b) states that recoverable removal costs are "all removal costs incurred by the United States . . . under subsection (c), (d), (e), or (*l*) of section 1321 of this title[.]"[7] The referenced subsection 1321(c) sets out federal removal authority, and specifically authorizes the President or his designee to carry out removal activities, arrange for removal activities and "or monitor" removal activities.[8] The court's original view of the latter provision to the contrary notwithstanding, the court is now persuaded that a fair reading of the

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[6] 33 U.S.C. § 2702(a).

[7] 33 U.S.C. § 2702(b)(1)(A).

[8] 33 U.S.C. § 1321(c)(1)(B)(ii).

whole of OPA leads to the conclusion that Congress intended monitoring costs to be recoverable.

The ambiguity which has been observed by the court as between the statutory definition of "remove" and "removal costs" in subsection 2701(30) and (31) on the one hand, and subsection 2712(a)(1) on the other hand, calls into play both the involved agency's own interpretation of the statute as well as legislative history. As already noted, the agency view is that monitoring costs are recoverable. The legislative history to which the government points is not particularly helpful, for it appears to focus on recovery of monies paid out of the Fund[9] rather than upon direct reimbursement to an agency, which appears to be the posture of this case. Nevertheless, the legislative history of OPA appears not to be inconsistent with the government's contention, and it fails to support the court's initial view that monitoring costs were not included in recoverable removal costs. Having reconsidered the matter, the court now concludes that monitoring costs are included in removal costs which the government may seek to recover from a responsible party.

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[9] The government refers the court to a conference committee report found at H.R. Rep. No. 653, 101st Cong. 2d Sess. at 112-114 (1990), *reprinted in* 1990 U.S.C.C.A.N. 779 790-92. Here we read, "[w]henever payments are made out of the Fund for the purposes listed in categories (1) through (4), vigorous efforts should be made by the Fund to seek prompt and full reimbursement from the responsible parties[.]" The "category (1)" referred to is that portion of OPA which makes reference to removal costs as including the costs of monitoring removal actions. 33 U.S.C. § 2712(a)(1).

DATED at Anchorage, Alaska, this 26 day of January, 1996.

/s/ H. Russel Holland,
H. Russel Holland, Judge
District of Alaska

A94-0391–CV (HRH)

M. WOODELL
R. BUNDY (US-ATTNY)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	No. A94-0391-CV (HRH)
vs.	)	
HYUNDAI MERCHANT MARINE CO., LTD., et al.,	)	
Defendants.	)	

ORDER

(Filed Jan. 26, 1996)

Motion for Partial Summary Judgment / Removal Costs

Plaintiff United States of America ("the government") moved for partial summary judgment.[1] This motion was opposed by defendants.[2] Oral argument was heard. This court entered an order partially denying the government's summary judgment motion[3] and requesting further briefing on the issue of how to determine what "all removal costs" entails and how defendant could challenge the inclusion of certain costs in the government's

[1] Clerk's Docket No. 17.

[2] Clerk's Docket No. 22.

[3] The court denied the government's motion as to a claim that monitoring costs are recoverable as removal costs. That aspect of the government's motion is being reconsidered, and a separate order on that subject is entered concurrently.

computation of "all removal costs". The government and defendants have filed the requested briefs.[4] The government requested and was granted leave to file a reply.[5]

The government contends that the Oil Pollution Act of 1990 ("OPA") permits it to recover full, actual removal costs in connection with an oil spill; that the person who determines if an action is necessary is the federal on-scene coordinator ("FOSC") as designated by the President of the United States; that the FOSC's actions can be reviewed under an arbitrary and capricious standard; that base costs are recoverable; that the Coast Guard uses accepted accounting procedures; and that the "primary purpose" test applies. Defendants contend: that the Coast Guard can only recover actual removal costs, actual containment costs, and costs for actions necessary to minimize or mitigate damages from an oil spill; that claimed costs must result from the pollution incident, no day-to-day costs (base costs) being allowed although incremental costs are recoverable; that response costs should be calculated using accepted accounting procedures; and that only costs incurred for the primary purpose of oil pollution removal are recoverable.

It is readily apparent that there are areas of agreement between the parties and areas of disagreement. Where there is agreement, little or nothing more need be said. Moreover, it is the court's perception that the problem before counsel and the court may by and large be a semantic one.

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[4] Clerk's Docket No. 36 and No. 38.

[5] Clerk's Docket No. 43 and No. 49.

The basic framework of OPA is as follows. OPA requires that all removal costs be originally presented to the responsible party. 33 U.S.C. § 2713(a). The government may bring an action against a responsible party for removal costs within three years of the removal action. 33 U.S.C. § 2717(f)(2). A responsible party may defend by showing by a preponderance of the evidence that the discharge was caused by one of the following: (1) an act of God; (2) an act of war; or (3) an act or omission of a third party. 33 U.S.C. § 2703(a). A responsible party is not liable to a claimant who engaged in gross negligence or willful misconduct. 33 U.S.C. § 2703(b). OPA does not provide for an express mechanism for evaluating or challenging what costs of removal are recoverable.

OPA states in pertinent part:

> (a) In general
>
> Notwithstanding any other provision or rule of law, and subject to the provisions of this chapter, each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages specified in subsection (b) that result from such incident.
>
> (b) Covered removal costs and damages
>
> (1) Removal costs
>
> The removal costs referred to in subsection (a) of this section are –
>
> (A) all removal costs incurred by the United States . . . under subsection (c), (d), (e),

or (*l*) of section 1321 of this title, as amended by this Act. . . .

33 U.S.C. § 2702(a), (b)(1)(A).

Subsections (c) and (*l*) of Section 1321 of Title 33 provides in pertinent part that:

(c) *Federal removal authority*

(1) *General removal requirement*

(A) The President shall, in accordance with the National Contingency Plan and any appropriate Area Contingency Plan, ensure effective and immediate removal of a discharge, and mitigation or prevention of a substantial threat of a discharge, of oil or a hazardous substance –

(i) into or on the navigable waters. . . .

. . . .

(B) In carrying out this paragraph, the President may –

(i) remove or arrange for the removal of a discharge, and mitigate or prevent a substantial threat of a discharge, at any time;

(ii) direct or monitor all Federal, State, and private actions to remove a discharge; and

(iii) remove and, if necessary, destroy a vessel discharging, or threatening to discharge, by whatever means are available.

. . . .

(*l*) *Administration*

The President is authorized to delegate the administration of this section to the heads of

> those Federal departments, agencies, and instrumentalities which he determines to be appropriate. Each such department, agency, and instrumentality, in order to avoid duplication of effort, shall, whenever appropriate, utilize the personnel, services, and facilities of other federal departments, agencies, and instrumentalities.

For purposes of this case, the President's designee is the United States Coast Guard, herein the "FOSC".

In the court's previous order of July 11, 1995,[6] the court held that:

> [T]here must be a nexus between a claimed cost and the underlying oil spill. It is currently unclear to the court whether it should employ a proximate cause concept, a "some evidence" – arbitrariness APA concept, or something even less such as a "good faith assertion on the part of the government.[7]

Following up on this point, the court now concludes that the government must establish in support of an OPA claim that removal costs for which it seeks reimbursement were caused in fact by the pollution incident or that they would not have been incurred but for the incident as to which the defendant is the responsible party. In this regard, OPA expressly provides that the "responsible party" must pay removal costs and damages which "result from such incident." 33 U.S.C. § 2702(a).

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[6] Clerk's Docket No. 31.

[7] *Id.* at 7-8.

The court now turns to the question of how costs caused by a pollution incident are to be valued or evaluated where there is disagreement as to whether a given item qualifies as a part of "all removal costs". 33 U.S.C. § 2702(b)(1)(A). The court's concern and question here has been whether or not the actual expenditure of money by authorization of the FOSC precludes any discussion of the appropriateness or recoverability of a cost. The court concludes that there is limited room for a defendant to dispute the FOSC's decision to authorize an expenditure. *United States v. Northeastern Pharmaceutical*, 810 F.2d 726, 747-48 (8th Cir. 1986).

The court and the parties have had some discussion about the use of an administrative procedure act type of review of FOSC decisions. There are some difficulties with this approach and the court has doubted the appropriateness of employing that standard. The decision of the FOSC is not an administratively final, appealable administrative decision. Rather, the FOSC's decision merely sets the stage for clean-up work and the incurring of costs which involves no input from the responsible party. There is no administratively final agency action. *See Conoco, Inc. v. United States*, No. 93-3080, 1994 WL 24249 at 2 (E.D. La. Jan. 14, 1994). This litigation is the potentially responsible party's first meaningful opportunity to challenge the application and interpretation of OPA and the decisions of the FOSC. *Id.* However, the court is now persuaded that the absence of a final administrative ruling does not mean that it is inappropriate for the court to use an arbitrary and capricious standard for the appraisal of removal costs. *Northeastern Pharmaceutical*, 810 F.2d at 747-48.

As noted above, the parties are in agreement as to some aspects of a court's analysis of FOSC decisions to incur potentially recoverable removal costs. Perhaps most importantly, the parties agree with the general proposition that the arbitrary and capricious standard be used to evaluate the FOSC decisions. The parties are in agreement that generally accepted accounting procedures should be employed where appropriate, and the court agrees. The parties also agree that a consideration in the evaluation process is the use and application of the Coast Guard's "primary purpose" rule for expense allocation. Not surprisingly, the parties disagree as to the application of the foregoing to the facts of this case. The court does not address application issues here.

Finally, it appears that in some sense the parties are in agreement about the recovery of actual removal costs. It is at least clear that actual costs do not properly include any sort of penalty, surcharge, or intangible assessment which inflates monies actually expended for the removal of oil. However, simply characterizing an item as an "actual" cost because the Coast Guard spent money with respect to a particular pollution incident does not, *ipso facto*, make it recoverable. Such a characterization simply begs the question which is at the heart of this discussion. Similarly, the parties' discussion of OPA's use of the term "necessary" in the definition of "remove" or "removal" as regards costs incurred to minimize or mitigate damage is somewhat circular. Simply characterizing an expense as "necessary" does not answer the question: "Is the responsible party liable for a particular expenditure under the circumstances of a particular pollution incident.?"

In evaluating a claim such as that asserted against a potentially responsible party in this case, the court's inquiry will of course begin with any questions which may be raised as to whether the requisite nexus or causation exists as between a pollution incident and an expense actually paid out by the Coast Guard. These actual expenditures may be subject to some general accounting analysis which the court will not now endeavor to particularize. Directly related to the foregoing is the application to actual costs of the primary purpose test which states that if the primary use of a specific Coast Guard resource was for pollution control, then those costs are recoverable. Any or all of the actual costs are subject to scrutiny for arbitrariness.

The parties disagree as to whether so-called "base costs" are recoverable. By "base costs", the parties appear to have reference to, for example, salaries of employees who would have been paid irrespective of a particular pollution incident. It is the court's perception that such costs are not *per se* recoverable. In other words, simply showing the requisite causation and characterizing an item as a base cost incurred during the effort to remove an oil spill attributable to a particular responsible party does not make that cost recoverable. It is the court's current perception that the primary purpose rule must be applied to base costs. Generally acceptable accounting procedures must be employed. In the end, there must be a non-arbitrary (rational) basis for base costs and, that being established, base costs are recoverable as "all removal costs incurred by the United States". 33 U.S.C. § 2702(b)(1)(A).

It seems probable that from time to time issues will arise as to whether a particular cost actually incurred in the course of a chargeable pollution incident should have been authorized at all by the FOSC. Questions may arise as to whether costs incurred to minimize or mitigate damage were actually "necessary" under the definition of "remove" set forth in 33 U.S.C. § 2701(30). It is the court's perception that it is the claimant's burden to demonstrate that there was a non-arbitrary (rational) basis for authorizing the expenditures.

Although the "necessary" condition was not appended to the definition of "remove" as regards containment and costs of removing oil from water, it is the court's view that such a condition is implicit and quite necessary for two reasons. Firstly, one can hardly say that the requisite nexus or causation exists as between a pollution incident and a cost authorized by an FOSC to, for example, replace a piece of equipment which had failed in the course of a prior, unrelated pollution incident. Secondly, to suggest that a cost is recoverable if the requisite causation exists simply because the FOSC authorized it in substance deprives a responsible party of any judicial review, and such a position would pose a serious due process problem. The court's example is of course an extreme one. The more likely situation is one where the FOSC has authorized an expenditure and the potentially responsible party views it as significantly disproportionate to the facts of the incident. As to such questions, and as already suggested, fairness and proportionality come into consideration as a part of the arbitrariness analysis. It is simply not rational to use a large vessel to go after a spill of a few gallons of oily water

from a frozen pipe which is known to have already been repaired or sealed off. Here again, expert testimony may very well be necessary in a seriously contested response situation.

With the foregoing further amplification, the plaintiff's motion for partial summary judgment[8] is granted in part and denied in part in accordance with this order and the court's order of July 11, 1995.[9]

DATED at Anchorage, Alaska, this 26 day of January, 1996.

/s/ H. Russel Holland
H. Russel Holland, Judge
District of Alaska

A94-0391–CV (HRH)

M. WOODELL
R. BUNDY (US-ATTNY)

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[8] Clerk's Docket No. 17.

[9] Clerk's Docket No. 31.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, vs. HYUNDAI MERCHANT MARINE CO., LTD., et al., Defendants.	No. A94-0391-CV (HRH) (Filed Mar 31, 1997)

FINDINGS OF FACT & CONCLUSIONS OF LAW

Commencing on December 9, 1996, the above-captioned case was tried to the court. Based upon the testimony taken at trial and the exhibits admitted into evidence, the court prepared its own proposed findings of fact and conclusions of law which were circulated to counsel for review. The court scheduled oral argument in the case to follow distribution of its proposed findings and conclusions, and, in connection therewith, solicited the parties to file specific suggestions for revisions or additional findings of fact and conclusions of law.[1]

Counsel have submitted stipulated technical corrections which the court incorporated into its proposed findings of fact and conclusions of law.[2] Both plaintiff and

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[1] Clerk's Docket No. 91.

[2] Clerk's Docket No. 96.

defendants submitted written suggestions for revisions and additions to the court's proposed findings of fact and conclusions of law which have now been considered by the court, and many of which have been incorporated into the court's proposed findings of fact and conclusions of law on the basis of the court's further evaluation of the evidence and arguments of counsel. Oral argument was heard on March 14, 1997, and the court now enters its final findings of fact and conclusions of law.

Findings of Fact

A. The Grounding of the M/V Hyundai No. 12

(1) Plaintiff United States of America, on behalf of the United States Coast Guard, seeks to recover from the defendants the costs associated with the Coast Guard's monitoring of and participation in the activities which followed the grounding of the *M/V Hyundai No. 12* on October 2, 1991.

(2) Defendant Hyundai Merchant Marine Co., Ltd., at all relevant times was the owner and operator of the *M/V Hyundai No. 12*. Defendant Britannia Steam Ship Insurance Association, Ltd., insured Hyundai and the *M/V Hyundai No. 12* against marine oil pollution liabilities for purposes of the Oil Pollution Act of 1990 (OPA 90), 33 U.S.C. § 2701, *et seq.* Plaintiff's claims do not exceed the limits of liability of Britannia's insurance policy.

(3) Defendant's Sherbet Holding Corporation and Eurobahia Oversea Corporation, were dismissed from this action by agreement of the parties. Plaintiff abandoned and the court has dismissed all claims of the

plaintiff except those arising under OPA 90. By agreement of the parties at oral argument, the defendant vessel is dismissed.

(4) On September 24, 1991, the *M/V Hyundai No. 12* departed Portland, Oregon, with a cargo of approximately 24,000 metric tons of grain. The vessel was destined for ports in the Far East by a Great Circle Route. The vessel had intended to pass to the south of the Shumagin Islands, Alaska; but, owing to the approach of a storm, the vessel took refuge near the northeast coast of Little Koniuji Island, on the evening of October 1, 1991.

(5) On the morning of October 2, 1991, the heavy weather having passed, the vessel proceeded on her voyage on a course of 233 or 235 degrees which was intended to transit 12 Fathom Strait, a relatively narrow passage between Little Koniuji Island and Simeonoff Island. At approximately 0830 hours, and near the midpoint of this passage, and while travelling at approximately 10 knots, the vessel unexpectedly (the court has been made aware of no charted hazards) grounded and stranded. The situation was promptly reported to Hyundai representatives and to the United States Coast Guard.

(6) The *M/V Hyundai No. 12* was a double-hulled vessel in the sense that all of the cargo holds of the vessel were separated from the sea by either ballast tanks or fuel tanks. Ballast water was carried in the tanks around the perimeter of the vessel. Fuel was carried in three large tanks in the bottom of the vessel underneath the cargo holds.

(7) It was known by the crew early on that at least three forward ballast tanks were holed. By noon on October 3, 1991, it was learned that the forward (No. 3) center fuel tank had been holed. In addition to her cargo, the *M/V Hyundai No. 12* carried approximately 650 metric tons (between 180,000 and 200,000 gallons) of IFO-180 fuel oil and a small quantity of diesel fuel. The IFO-180 fuel oil is a residual type product short on volatile elements and requiring heat for purposes of pumping. It evaporates slowly if at all, and disperses poorly when exposed to the elements.

(8) The position at which the *M/V Hyundai No. 12* anchored on the night of October 1, 1991, is inside the three-mile territorial seas of the State of Alaska and in close proximity to Atkins Island which lies just offshore to the northeast of Little Koniuji Island. Atkins Island is a protected sea lion rookery. All of the islands mentioned herein (Little Koniuji, Simeonoff, and Atkins) are located within the Alaska Maritime National Wildlife Refuge.

(9) The area where the vessel became stranded is one of great environmental sensitivity. The Steller's sea lion which frequents the area is a threatened species under the classifications of the Endangered Species Act. The islands and surrounding seas are habitat for numerous other sea mammals and sea birds. Streams flowing into 12 Fathom Strait are spawning grounds for anadromous fish – principally salmon.

(10) The stranding of the *M/V Hyundai No. 12* was timely reported to the chief of the staff of the Seventeenth Coast Guard District headquartered at Juneau, Alaska. A

search and rescue mission (SAR; the coast Guard acronym for a search and rescue project) was promptly authorized, and the Coast Guard cutter *Sherman* was dispatched to the scene. Due to the nature of the incident and the information conveyed concerning the location and situation of the vessel and her cargo and fuel, the captain of the port at the Marine Safety Office at Anchorage, Alaska, was also notified. The Marine Safety Office-Anchorage, and in particular the captain of the port at Anchorage, is the duly designated, federal on-scene coordinator (FOSC) for pollution events occurring in the Shumagin Islands. The FOSC promptly began gathering information and planning for a marine environmental project (MEP; the Coast Guard acronym for an oil spill). Simultaneously, representatives of the vessel owner and representatives of her insurer began inquiries and preparation for the salvage of the *M/V Hyundai No. 12* and a potential pollution response.

(11) The Coast Guard cutter *Sherman* arrived at the scene at approximately 1720 hours[3] on October 2, 1991. Using both a helicopter and a small vessel carried by the *Sherman*, a survey of the situation was promptly undertaken. The court finds[4] that by 2030 hours on October 2,

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[3] For convenience, the court will, as have the parties generally, employ a 24-hour clock. All times will be local Alaska Time, which the court understands to be eight hours earlier (ahead of) Greenwich Mean Time which is employed by the Coast Guard in its communications.

[4] Heretofore the court has recited facts which it believes to be undisputed. There is much more information relevant to this case which is also undisputed and will be set out below. However, where the court precedes its statements by the words

1991, it had been determined that there was no immediate threat to life or property, and the SAR project of the *Sherman* was terminated.

(12) The court further finds that the Coast Guard cutter *Sherman* stayed on scene until October 4, 1991; and that during this time period, she was involved in an MEP under the command of the Seventeenth Coast Guard District with pollution operations input from the FOSC. The court finds that, given the very sensitive nature of the location, the frequency of heavy weather during October, the volume of bunker fuel carried by the vessel, and the fact that at least one fuel tank was known to have been holed, there was a very great risk of serious environmental damage. The court finds that the decision to maintain the presence of the *Sherman* on scene was based upon non-arbitrary and rational considerations and that the primary purpose of her presence on scene was to monitor the situation while all of the Coast Guard, the vessel owner, and her insurers formulated a plan to salvage the vessel and recover any spilled fuel should it escape from the vessel.

(13) Unlike the Coast Guard, neither the vessel owner nor her insurers had any vessel, equipment, or supplies

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"the court finds", it is making a decision on the basis of facts which it believes to be disputed; and, in so doing, the court is applying the preponderance of the evidence rule as to the party (the United States) having the burden of proof. In the instance here under consideration, there is some evidence which would suggest that the SAR project was not concluded until long after October 2, 1991; however, for purposes of the plaintiff's claim, the court finds that the SAR was ended at 2030 hours on October 2, 1991.

anywhere in the vicinity of the grounding. The court finds that during the first three days of the incident, the Coast Guard was in a superior position to monitor and assist in response to the grounding.

(14) In addition to dispatching the *Sherman*, the Coast Guard, on October 3, 1991, called upon the Pacific Strike Team (PST) to provide assistance and called upon the cutter *Acushnet* to load equipment at Kodiak, Alaska, and proceed to the *M/V Hyundai No. 12*. The PST is a group within the Coast Guard expressly tasked to provide men and equipment on an emergency basis in response to a pollution incident. Owing to the remote and sensitive nature of the location of the grounding in question, the decision to activate the PST for service in connection with the *M/V Hyundai No. 12* MEP was based upon non-arbitrary and rational considerations. PST personnel assisted throughout this project, providing labor, technical assistance, and equipment. The PST brought a plane-load (a C130 Hercules, capable of carrying four heavy pallets, the crew, and their baggage) of men and equipment to the scene, landing at Sand Point, Alaska, some 50 miles from the grounding scene. The court finds that, by and large, the personnel and equipment[5] brought to Alaska by the PST was reasonably necessary as a part of the Coast Guard's response to the pollution incident and the decision to bring PST personnel equipment to the MEP was based upon non-arbitrary and rational considerations. No

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[5] Some of the equipment flown to Alaska (in particular, some of the pumps and hoses) were not usable; but the court understands that no billing has been made for this equipment.

other party or entity was in a position to put vessels, men, and equipment on scene so quickly.

(15) The court finds that the decision to employ a government C130 aircraft to transport the PST and equipment to Alaska was based upon non-arbitrary and rational considerations. The court finds that use of commercial aircraft would not have been feasible, nor could the response have been achieved as quickly. The court finds that the decision to employ government aircraft to return personnel and equipment to the California base of the PST was based upon non-arbitrary and rational considerations.

(16) On October 4, 1991, the Coast Guard vessel *Acushnet* arrived on scene. The Sherman was released. The *Acushnet* is a former salvage vessel capable of providing crew and extra crew space and communications equipment. The court finds that the *Acushnet* was highly useful to the MEP as a floating command post or base of operations for the MEP from which the monitoring activity could be conducted. The court finds that this monitoring activity was not just a technical requirement nor a passive role. United States Coast Guard personnel participated actively, providing positive, useful input to the salvage plans of the vessel owner, her insurer, and their contractors.

(17) While planning was underway for the salvage of the *M/V Hyundai No.12*, the vessel continued to work on the rocky ledge on which she was stranded, especially with the changing of the tide. Additional tanks were holed. On the evening of October 4, 1991, the No. 2 bottom fuel tank was determined to be open to the sea.

From time to time, small leaks of oil and sheen were observed.

(18) Not until October 5, 1991, did the first owner-provided 65-foot fishing vessel, the *Annette*, arrive on scene. The court finds that this vessel alone was of little value as regards either the salvage of the *M/V Hyundai No. 12* or control of pollution.

(19) Also on October 5, 1991, the Coast Guard cutter *Sweetbriar* arrived on scene with equipment called the "open water oil containment and recovery" (OWOCR) system. The latter equipment had been pre-positioned by the PST on Kodiak Island. As its name implies, this equipment is designed to retrieve oil spilled at sea. It takes three vessels to operate the OWOCR system: two on either end of a containment boom, and a third positioned at the midpoint behind the catenary formed by the boom equipment. The third vessel holds power equipment that operates a hydraulic pump which, through a manifold and hoses, draws oil from sumps at various points built into the containment boom. The recovered oil and water is discharged into a tank of some form. In this instance, the Coast Guard supplied two dracones (large floating bladders which are designed to hold oil and water on a temporary basis for subsequent disposal) .

(20) The court finds that there was at all times a moderate risk that the *M/V Hyundai No. 12* would break up. It was both non-arbitrary and rational, given the sensitive nature of the area in question and the unavailability of owner/insurer provided equipment in the early stages of the project, for the Coast Guard to plan and equip for a "worst case" scenario. The court finds

that a realistic, worst case scenario was that much or all of the 180,000 to 200,000 gallons of IFO-180 fuel would be spilled into 12 Fathom Strait. In such an incident, it would be necessary to simultaneously deal with a broken vessel, one or both parts of which might continue to float, as well as an oil spill. The court finds that the presence of both the *Acushnet* and the *Sweetbriar* with the OWOCR system, assisted by the PST, were non-arbitrary and rational responses to the real risks presented by the grounding of the *M/V Hyundai No. 12*. The primary purpose of these vessels, men, and equipment was to respond to an MEP.

(21) The court finds that, from October 2 until on or about October 9 (eight days into the incident), the vessel owners and their insurers, although they had assumed responsibility for the salvage and any necessary cleanup and were proceeding diligently with planning and salvage arrangements, had no vessel on scene capable of dealing with a catastrophic situation. The court finds that the decision of the Coast Guard to plan and equip the MEP project as found herein rather than waiting to see what would come of the owners' and insurers' acceptance of responsibility for salvage and pollution abatement was rational and not arbitrary. The court finds that it must have been clear to all concerned that it would be a number of days before the owners and insurers could arrange for and have vessels and other equipment brought to the remote scene; whereas, the Coast Guard generally and the PST in particular are tasked with being ready and making themselves available for such incidents. The court finds that it would have been irresponsible for the Coast Guard not to have undertaken the actions which it took, even though the owners and

insurers assumed responsibility for the incident. The court finds that the owners and insurers, even with the exercise of all due diligence, were simply not in a position to respond as quickly as the exigencies of this incident required given the precarious position of the *M/V Hyundai No. 12*, her heavy load of IFO-180 fuel and the close proximity of sensitive environmental areas and fish and wildlife. The court finds that the continued presence of the *Sherman* on scene, the early deployment of the PST and its equipment, and the arrangements for the early presence of the *Sweetbriar* and her equipment were entirely non-arbitrary and rational responses to the apparent pollution risk.

(22) Very early in the development of the MEP, and in timely fashion, the vessel owner and her insurers entered into a contract with Crowley Maritime Services for vessels and equipment necessary to salvage the *M/V Hyundai No. 12*. Soon after the arrival of Crowley Maritime personnel and before the first effort to free the *M/V Hyundai No. 12*, all concerned had devised a plan for refloating the vessel which included pressurizing the ballast tanks and unloading all or as much as possible of the IFO-180 fuel and as much cargo as was necessary to allow the vessel to float free at high tide. It was initially estimated that the vessel was aground by 1,900 metric tons. This figure was later reduced to 1,660 metric tons. Because the vessel was holed, and because oil floats on water, it was possible to endeavor to remove fuel off the top of the tanks; but in the process, hydrostatic pressure from outside the vessel resulted in water flowing into the fuel tanks. Thus the removal of fuel did not lighten the vessel. Indeed, it made the vessel heavier because water is heavier than oil. Thus,

in addition to removing fuel, the salvors devised a plan to pressurize ballast tanks, employing compressed air, to force water from these tanks and thereby providing buoyancy. It appears to the court that all concerned had hoped that simply blowing the ballast tanks might provide sufficient buoyancy to allow a powerful tug, assisted by the *M/V Hyundai No. 12* engines which were still functional, to pull the vessel from what divers reported to be a rock shelf upon which the vessel had grounded. As set out below, this effort failed. Information provided by divers and other information acquired as the situation progressed suggest that the forward momentum of the vessel quite probably carried her up upon, and potentially over top of a sort of pinnacle rock or rocks, upon which the vessel could pivot during high tides and storms but from which she could not be removed without significant unladening.

(23) The tug *Oliktok* and *Barge 160-4* arrived on scene on October 7, 1991. On this same day, the owners and their insurers also provided three additional fishing vessels. The four fishing vessels now on scene with the equipment provided with them were variously employed in the placement of protective booms around streams and managing the "Goodyear" boom supplied by the Coast Guard for purposes of trapping oil in the immediate vicinity of the *M/V Hyundai No. 12* for removal with the OWOCR system in the event of a serious spill. These vessels and their equipment were all necessary and useful; however, the court finds that these vessels could not have managed both a break-up of the *M/V Hyundai No. 12* and a spill of fuel in a storm.

(24) On the evening of October 7/8, 1991, the accident scene was struck by a storm. The storm prevented removal of any fuel from the *M/V Hyundai No. 12*. Prior to the storm, the *M/V Hyundai No.* 12 was Headed at 214°. During the storm of October 7/8, 1991 the vessel pivoted on the rocks which held her fast. After the storm, the *M/V Hyundai No. 12* was headed at 105° and was found to have suffered additional damage to her bottom.

(25) By October 9, 1991, the storm had abated. Operations for removal of fuel employing the *Oliktok* and *Barge 160-4* commenced. Also on October 9, 1991, the contractor supplied, salvage tug *Geronimo* arrived on scene and undertook an initial effort to free the *M/V Hyundai No. 12* from her strand. The effort failed.

(26) On October 10, 1991, the Crowley Maritime vessels *Avenger*, an additional tug, and *Arctic Salvor*, a salvage vessel, arrived on scene. With ballast tanks pressurized and some grain cargo[6] removed, a second effort at pulling the *M/V Hyundai No. 12* free was undertaken. This effort also failed.

(27) Meanwhile, efforts had been underway to locate and obtain the use of large, heavy grain evacuators. This

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[6] Permission to dump grain overboard had been obtained in order to lighten the vessel. The means of accomplishing this unloading were crude. Some grain was loaded by hand by PST crewmen into makeshift bins which were then dumped, using the ship's tackle. A pumping operation employing Coast Guard supplied equipment was somewhat more effective; however, this arrangement appears to have been makeshift and incapable of moving anything like the volume of grain necessary to sufficiently lighten the vessel.

equipment did not arrive on scene until approximately 2200 hours, October 11, 1991. This equipment was put to good use within a matter of a few hours, and was capable of moving large volumes of grain from the forward hold of the *M/V Hyundai No. 12*. This operation continued on October 12, along with the removal of fuel which was completed that day.[7] The court finds that until the large grain elevators arrived and were put to use, the possibility that the *M/V Hyundai No. 12* might not be salvaged and might break up, spilling some or all of the fuel remaining on board, remained a real, significant risk.

(28) The court finds that the vessel owner, her insurers, and their contractors responded with reasonable promptness, diligence, and competency in carrying out their responsibilities under OPA 90 in light of the difficult circumstances and remote location of the grounding of the *M/V Hyundai No. 12*. As reflected by the foregoing findings, the latter circumstances necessitated a major commitment of resources by the United States Coast Guard pending the arrival of resources arranged by the vessel owner and her insurers. Once the latter had a full complement of vessels and equipment including the large grain evacuators on scene, the Coast Guard began to scale back its presence on scene. The *Acushnet* was released on October 11, 1991.

(29) On October 12, 1991, the Coast Guard cutter *Sedge* arrived on scene, picked up the OWOCR, and relieved the cutter *Sweetbriar*.

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[7] Approximately 100,000 gallons of fuel (50% to 60% of the total on board) were ultimately removed from the vessel.

(30) On October 12, 1991, having calculated that the combined removal of fuel and cargo had sufficiently lightened the *M/V Hyundai No. 12* to permit her to float free at high tide, a third effort to tow the vessel was made and was successful. The *M/V Hyundai No. 12* proceeded under her own power to Sand Point. She was accompanied by the cutter *Sedge*. Inspection by divers at Sand Point disclosed a total of 133 cracks in the hull of the vessel, one of which was 6 feet wide and 42 feet long.

(31) From October 5, 1991, until the departure of the *Acushnet* on October 11, 1991, the Coast Guard continuously had two substantial vessels on scene: the *Acushnet* and the *Sweetbriar*. The court finds that the primary purpose of both was to attend the MEP. The decision to retain both of these vessels on scene was non-arbitrary and rational, for they had different purposes and capabilities. The principal role of the *Acushnet* was to provide a command post and base of operations for the Coast Guard monitoring of the salvage efforts. The *Acushnet* could not deploy the OWOCR system which was aboard the *Sweetbriar*. The *Sweetbriar*, a buoy tender, was fitted to efficiently deploy the OWOCR system and assist in its operation. The *Acushnet* was also capable of assisting in the operation of the OWOCR system after its deployment. In the event of weather which the fishing vessels could not handle, or in the event of one or more of them being disabled, the second Coast Guard vessel could and would have provided assistance. In particular, and in addition to deploying OWOCR system, the *Sweetbriar* provided a necessary level of insurance against disaster between October 4 and October 9 when Crowley Maritime tug *Geronimo* arrived. Even after the arrival of the *Geronimo*,

the decision to keen the *Sweetbriar* on scene for possible deployment of the OWOCR system was non-arbitrary and rational. The court finds that there was not an excessive dedication of assets to the *M/V Hyundai No. 12* MEP.

(32) The court finds that the Coast Guard timely withdrew the *Acushnet,* when it became apparent that successful salvage was imminent by reason of the operation of the large grain evacuators and the near completion of fuel removal from the *M/V Hyundai No. 12.*

(33) Temporary repairs were made on the *M/V Hyundai No. 12* at Sand Point, Alaska; and, on November 15, 1991, she was taken in tow by the tug *Hyundai 1003* and moved to Korea for permanent repairs.

B. Billings for Coast Guard Costs

(34) The standard rates which were employed by the United States Coast Guard in billing the defendants for costs in connection with the grounding of the *M/V Hyundai No. 12* were expressly published for the purpose of "establish[ing] standard rates to be used in computing reimbursable charges."[8]

(35) This rate structure is employed for the purpose of billing other federal agencies and all third parties who by agreement, statute, or treaty are responsible for reimbursing the United States Coast Guard for services rendered by it. There are minor variants in the rates,

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[8] Plaintiff's Exhibit 59, COMDT INST 7310.1.E at 1.

depending upon whether the responsible party is a government agency or a third party. These variants are not in dispute.

(36) The court finds that the standard rates are in fact based upon actual costs incurred by the United States Coast Guard for personnel and equipment which it provides in the service of others. The United States Coast Guard has employed generally accepted accounting practices, including Government cost accounting procedures which were extant at the time Commandant Instruction No. 7310.1.E was developed.

(37) Generally, the court finds that Commandant Instruction No. 7310.1.E was not arbitrary, capricious, or unreasonable, nor inconsistent with any generally accepted accounting practices. More specifically, the court finds that:

(a) Generally accepted government accounting practices extant at the time in question advocated the concept of full cost recovery.

(b) Standard rates properly include both payroll costs and the capital or acquisition costs of facilities, even though these costs were already incurred and/or would have been incurred by the United States Coast Guard irrespective of the grounding of the *M/V Hyundai No. 12*.

(c) Standard rates are not limited to incremental costs. Were the United States Coast Guard to bill only for incremental costs, the concept of full cost recovery would by and large be defeated where, as in the instance of the United States Coast Guard and the grounding incident in question, the great bulk of the services rendered were

with extant personnel and equipment, all of which were on call for search and rescue (SAR) and marine environment pollution (MEP) incidents such as that at issue here.

(d) The standard rate for facilities (for example, a Coast Guard cutter) are constructed employing a methodology which depends upon the number of hours of use of the facility to compute a divisor which is employed in spreading total costs. (As a matter of pure mathematics, the larger the divisor, the lower the resultant hourly rate will be for a facility.) The methodology employed by the Coast Guard assumes and uses for this purpose 185 away-from-home-port days per year in computing the standard rates for Coast Guard cutters. Similarly, this methodology assumes a 21-hour day for purposes of converting rates to an hourly rate. (Here again, use of a 24-hour day would result in a lower hourly rate.) This methodology is consistently applied by the Coast Guard as to all cost reimbursement situations. This methodology is not inconsistent with any generally accepted government accounting policy or practice. This methodology is consistent with a concept of full cost recovery. It is not arbitrary, capricious, or unreasonable for the United States Coast Guard to assume for purposes of constructing standard rates for full cost recovery that its vessels will be effectively engaged 185 days a year and 21 hours per day. The court acknowledges that there is conflicting testimony on this point, and further acknowledges that reasonable and rational arguments for different assumptions can be made. However, such does not render unreasonable or arbitrary the assumptions which the Coast Guard has made.

(e) Commandant instruction No. 73-10-1.E makes express provision for the inclusion of "a factor for administrative support".[9] The instruction further provides:

> This essentially represents the cost relationship of Headquarters, area, MLC and district offices to other Coast Guard activities. The factor is applied to charges for federal agencies and private parties to recover operating costs not directly identifiable to the effort performed.[10]

The subject instruction further provides, as regards hourly standard rates for cutters, aircraft, and pollution clean-up equipment as regards "administrative support":

> Relationship of administrative support to benefitting activities, currently 30% Rate applied to total of facility costs and field operational support.[11]

In billing the defendants as described above, the United States Coast Guard enhanced total facility costs and field operational support costs by this 30% factor.

(f) The court finds that the administrative overhead methodology employed by the United States Coast Guard in fact accomplishes what Commandant Instruction No. 7310.1.E intended, that is, the recovery of Coast Guard operating costs which are not directly identifiable to (for example) the grounding of the *M/V Hyundai No. 12*.

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[9] *Id.* at 1, ¶ 3.c.

[10] *Id.*

[11] *Id.*, enclosure 1 at 1. The language quoted in the text is varied somewhat as regards aircraft and pollution cleanup equipment, but the court perceives no substantive difference in terms of the issues in this case.

(g) The court finds that there are other formulations which might have been employed by the United States Coast Guard which would also have reasonably approached full cost recovery as regards operating expenses not directly identifiable to a particular effort performed. Such finding does not, however, render the Coast Guard methodology unreasonable, arbitrary, or capricious. The Coast Guard has undertaken a comparison of actual costs versus standard rates for various facilities employed in the subject incident (the vessels *Sherman, Acushnet, Sweetbriar,* and *Sedge,* and a C130 Hercules and an HH-3F aircraft) . This analysis demonstrates that some facilities (for example, the *Sherman*) may have been underbilled employing standard rates, whereas the *Acushnet* was slightly overbilled and the *Sweetbriar* and *Sedge* were overbilled to a somewhat greater extent. On balance, however, this analysis showed that overall, vessels were underbilled employing standard rates. Similarly, the analysis suggests that aircraft were significantly underbilled by the use of standard rates when comparing actual costs as computed for this study with standard rates as constructed by the methodology employed in billing the defendants.[12]

(h) As regards both the employment of away-from-home-port days, etc., and a 30% factor for administrative overhead, neither plaintiff's nor defendants' witnesses nor the exhibits establish a right or wrong methodology

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[12] The court puts little weight on this finding on the assumption that the actual cost analysis, like the standard rate analysis, loaded in the 30% overhead factor which is itself the subject of a dispute.

for accounting for costs. Both the methodology employed by the United States Coast Guard, as well as that urged by defendants' expert, employ assumptions; and the court finds that the assumptions employed by the Coast Guard are not arbitrary or capricious, nor are they unreasonable or not in accordance with general accounting practices.

(38) On April 8, 1992, by direction of the Commander of the United States Coast Guard, National Pollution Funds Center, Hyundai Merchant Marine Co., Ltd., and the Britannia Steamship Insurance Association, Ltd., were billed $975,636.68 (exclusive of interest, penalties, and administrative costs or attorney's fees) on account of costs incurred by the United States Coast Guard in connection with the grounding of the *M/V Hyundai No. 12*.

(39) On May 4, 1992, by direction of the Commander of the United States Coast Guard, National Pollution Funds Center, Hyundai Merchant Marine Co., Ltd., and the Britannia Steamship Insurance Association, Ltd., were billed $18,084.13 (exclusive of interest, penalties, and administrative costs or attorney's fees) on account of additional costs incurred by the United States Coast Guard in connection with the grounding of the *M/V Hyundai No. 12*.

(40) On May 28, 1992, by direction of the Commander of the United States Coast Guard, National Pollution Funds Center, Hyundai Merchant Marine Co., Ltd., and the Britannia Steamship Insurance Association, Ltd., were billed $480.00 (exclusive of interest, penalties, and administrative costs or attorney's fees) on account of additional

costs incurred by the United States Coast Guard in connection with the grounding of the *M/V Hyundai No. 12.*

(41) On September 14, 1992, by direction of the Commander of the United States Coast Guard, National Pollution Funds Center, Hyundai Merchant Marine Co., Ltd., and the Britannia Steamship Insurance Association, Ltd., were billed $2,253.00 (exclusive of interest, penalties, and administrative costs or attorney's fees) on account of additional costs incurred by the United States Coast Guard in connection with the grounding of the *M/V Hyundai No. 12.*

(42) The court finds that the foregoing invoices were calculated in accordance with Commandant Instruction No. 7310.1.D. Except as hereinafter set forth in paragraph (45), the foregoing invoices accurately applied the rates of Commandant Instruction No. 7310.1.D. Except as hereinafter set forth in paragraph (45), the invoices accurately reflected the out-of-pocket costs incurred by the Coast Guard as well as accurately reflected the personnel and equipment and hours of usage associated with each which were devoted to the monitoring of and assistance in the salvage of the *M/V Hyundai No. 12.*

(43) Commandant Instruction No. 7310.1.D had been superseded by Commandant Instruction No. 7310.1.E on July 13, 1991. The court finds that the Seventeenth Coast Guard District (Alaska) received and the latter instruction became operative for the Seventeenth Coast Guard

District (Alaska) on or about July 13, 1991, a date preceding the grounding of the M/V Hyundai No. 12.[13]

(44) On August 13, 1996, by direction of the Commander of the United States Coast Guard, National Pollution Funds Center, Hyundai Merchant Marine Co., Ltd., and the Britannia Steamship Insurance Association, Ltd., were billed an additional $202,899.71 (exclusive of interest, penalties, and administrative costs or attorney's fees). This invoice revised all of the prior billings which were affected by the cancellation of Commandant Instruction No. 7310.1.D and its replacement by Commandant Instruction No. 7310.1.E. The court finds that this invoice accurately reflects the rate changes effected by the revision of Commandant Instruction No. 7310.1.D. Commandant Instruction No. 7310.1.E changed the applicable rates but did not change the methodology for calculating standard rates. Commandant Instruction No. 7310.1.E should have been employed in the initial billings, and the additional bill was proper subject to paragraph (45).

(45) Also on August 13, 1996, the National Pollution Funds Center authorized a credit against the foregoing invoices in favor of the defendants in the amount of $89,390.52. The court has not found in the record any discrete itemization of this credit; however, Commander Crampton testified generally that final bills were adjusted

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[13] The court finds that in effecting this change in policy, the United States Coast Guard employed an outdated standard distribution list; however, the court finds that Commandant Instruction No. 7310.1.E was distributed to the Seventeenth Coast Guard District (Alaska) so as to become effective prior to the date of the grounding of the *M/V Hyundai No. 12*.

downward in the foregoing amount so as to "back out" some charges for a buoy tender, the Coast Guard cutter *Sherman*, so as to delete overlapping charges when both the *Sedge* and the *Sweetbriar* were on scene and for the purpose of correcting some rates, etc. With this correction, the court finds that the above described billings include only vessels, equipment, personnel, and out-of-pocket costs reasonably necessary, actually used or useful for, and the primary purpose of which was, the Coast Guard's response to the discharge or threat of a discharge of oil from the *M/V Hyundai No. 12*.

(46) The court finds that the Coast Guard has not overbilled the time of the *Acushnet* by 62 hours as contended by defendants' witness Gallagher.[14]

(47) The court finds that the Coast Guard has not billed defendants for SAR time of the cutter *Sherman*.

(48) The court finds that the Coast Guard's removal costs and the decisions of the FOSC which led to those costs being incurred were neither arbitrary nor capricious, and, under the extreme and sensitive circumstances of this MEP project, were also reasonable and necessary costs.

Conclusions of Law

(49) This court has "exclusive original jurisdiction over all controversies arising under [Oil Pollution Act of 1990, herein OPA 90], without regard to the citizenship of the parties or the amount in controversy." 33 U.S.C.

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[14] *See* Exhibit C.I.

2717(b). Venue lies "in any district in which the discharge or injury or damages occurred . . . . " *Id.*

(50) Plaintiff's complaint in this case was timely filed. 33 U.S.C. § 2717(f)(2).

(51) Title 33, United States Code, Section 2702 (a) , provides:

> Notwithstanding any other provision or rule of law, and subject to the provisions of this chapter, each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages specified in subsection (b) that result from such incident.

The parties agree that under the foregoing provision of OPA 90, the Coast Guard is entitled to recover all removal costs, not just reasonable removal costs.[15] 33 U.S.C. § 2702(b)(1)(A).

(52) OPA 90 defines "removal costs" as:

> the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from such an incident[.]

33 U.S.C. § 2701(31).

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[15] Order of July 11, 1995, Clerk's Docket No. 31 at 6.

(53) Under OPA 90, monitoring costs incurred by the United States Coast Guard are recoverable as a part of "removal costs".[16]

(54) OPA 90 requires that all removal costs be originally presented to the responsible party. 33 U.S.C. § 2713(a).

(55) There is no contention in this case by the defendants that the discharge was caused by an act of God, an act of war, or the act or omission of a third party. 33 U.S.C. § 2703(a).

(56) There is no contention by the defendants that the plaintiff engaged in gross negligence or willful misconduct. 33 U.S.C. § 2703(b).

(57) The requirement of OPA 90 that removal costs and damages must "result from" an incident injects a causation concept into the cause of action to recover costs. The court holds that there must be a nexus between a claimed cost and the underlying pollution incident.[17] The court held before trial that the Coast Guard must establish in support of an OPA 90 claim that removal costs for which it seeks reimbursement were caused in fact by the pollution incident *or* that they would not have been incurred but for the incident as to which the defendant is the responsible party.[18] This case presents no difficulty as regards the application of the "but for" branch of the court's causation test as to out-of-pocket

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[16] Order of January 26, 1996, Clerk's Docket No. 55 at 3-4.

[17] Order of July 11, 1995, Clerk's Docket No. 31 at 7.

[18] Order of January 26, 1996, Clerk's Docket No. 54 at 5.

expenses incurred by the Coast Guard and billed to defendants. The "cause in fact" branch of the test has presented difficulty. Defendants in essence argue that costs such as permanent personnel and depreciation or capital costs (characterized sometimes by the parties as "base" costs) although incurred by the Coast Guard are not in fact caused by the grounding of the *M/V Hyundai No. 12*. The argument is a fair one, and it points up the difficulty of the court's endeavoring to articulate legal principles outside of the context of resolving a particular dispute. The latter is in a sense what this court did when it was asked to and announced the foregoing causation test. The court spoke with neither the full factual background for this case nor a full appreciation of the concept of full cost recovery which is implicit in OPA 90 and explicit in Executive Branch cost accounting policy. In its initial approach to this subject, the court simply held that there must be a nexus between a claimed cost and the underlying oil spill.[19] That holding now appears to be the more appropriate and useful one, although certainly the Government may establish the required nexus by showing either "cause in fact" or "but for" causation. The court now holds that, for purposes of OPA 90, it is sufficient for purposes of proof of causation for the Government to demonstrate that Government facilities (including crew) have been devoted to a particular pollution incident. As to such costs, the court holds that it is quite appropriate to bill as removal costs the expense associated with permanent Coast Guard personnel as

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[19] Order of July 11, 1995, Clerk's Docket No. 31 at 7.

well as an allowance for depreciation which reflects capital investment. When facilities are devoted to a particular MEP, such application of resources bears a sufficient nexus to a pollution incident that the associated costs are deemed to have resulted from a pollution incident for purposes of OPA 90. Due to the grounding of the *M/V Hyundai No. 12*, personnel, vessels, and other equipment which might have been employed elsewhere, were in fact applied to monitoring of and assisting in the salvage of the *M/V Hyundai No. 12*, and that is sufficient for purposes of the element of causation.

(58) With respect to administrative overhead, no additional showing of nexus or causation need be made by the Coast Guard over and above that required of it with respect to facilities actually devoted to a pollution incident and as to which the requisite causation has been demonstrated. Administrative overhead is inherent in the ownership and operation of the physical assets.

(59) Defendants have argued that plaintiff wrongfully sought to collect "assessment" costs. 40 C.F.R. § 300.300-315. Presently, it is not at all clear to the court what these assessment costs are or where they have been identified in plaintiff's billings. Moreover, it appears that the regulations in question postdate this incident.

(60) A finding of the requisite nexus or causation between costs and an MEP such as the grounding of the *M/V Hyundai No. 12* does not end the court's inquiry into

the recoverability of costs. In particular, the Government's base costs discussed above are not *per se* recoverable.[20] In addition to causation, to establish a right to recover removal costs, the Government must establish that the primary purpose of assets for which costs are sought was monitoring or containment and removal of oil in connection with the MEP in question. Generally accepted accounting procedures must be employed. There must be a non-arbitrary, rational basis for costs.[21] Fairness and proportionality are considered by the court as a part of its analysis of whether or not costs incurred are non-arbitrary and rational. As set out in the foregoing findings of fact, the Coast Guard billings for costs associated with monitoring the grounding of the *M/V Hyundai No. 12* met this standard.

(61) The court concludes that the costs reflected by plaintiff's billings to Hyundai Merchant Marine Co., Ltd., and Britannia Steam Ship Insurance Association, Ltd., are legally recoverable from them as "removal costs" associated with a pollution incident – that is, a situation involving a "substantial threat of a discharge of oil". 33 U.S.C. § 2702(a).

(62) Pursuant to 3 3 U.S.C. § 2705, Hyundai Merchant Marine Co., Ltd., as the responsible party, and Britannia Steam Ship Insurance Association, Ltd., as its insurer, are liable to the Coast Guard for interest on the removal costs. 33 U.S.C. § 2705(a). Interest is payable:

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[20] Order of January 26, 1996, Clerk's Docket No. 54 at 8.

[21] *Id.* at 8-9.

> beginning on the 30th day following the date on which the claim is presented to the responsible party or guarantor and ending on the date on which the claim is paid.

33 U.S.C. § 2705(b)(1). It is clear that accrued interest is not subject to liability limits. 33 U.S.C. § 2705(b)(5) Subsections 2705(a) and (b) are worded rather curiously in that they seem, by reason of using the past tense "paid", to contemplate that interest will be calculated and paid after the principal cost recovery amount has been paid. Perhaps Congress in fact anticipated the difficulties in calculating interest to which the parties have called attention.

(63) Subsection 2705(b)(4) provides, as regards the calculation of interest:

> The interest paid under this section shall be calculated at the average of the highest rate for commercial and finance company paper of maturities of 180 days or less obtaining on each of the days included within the period for which interest must be paid to the claimant, as published in the Federal Reserve Bulletin.

Subsection 2705(b)(4) contemplates that rates will be derived from both commercial and finance company paper. The paper to be used as the benchmark is that paper having maturities "of 180 days or less". The court takes the latter provision to mean that all of the rates for such paper having maturities of less than 180 days will be reviewed for purposes of the calculation, not just that paper with 180 days before maturity. In focusing upon a rate, subsection 2705(b)(4) requires use of the "highest" rate for the paper in question. The court understands the

Federal Reserve Bulletin in question to carry out what subsection 2705(b)(4) requires: survey the rates for all classes of commercial and finance company paper with 180 days or less maturity and average the highest of these. However, Congress appears to have contemplated that interest rates might vary as to any day for which interest was due. Apparently, the Federal Reserve Bulletin does not calculate and publish daily rates; only weekly and monthly rates are available.[22]

(64) In Exhibit 87, the United States Coast Guard sets out its methodology for calculating interest in connection with this matter. It appears to the court that the interest rate which the plaintiff proposes to charge is not the rate which obtained on each of the days included within the period for which interest must be paid, but, rather, is the single highest rate which occurred during the *months* included in the period for which interest is to be calculated. The text of plaintiff's Exhibit 87 confirms that the Coast Guard proposes using a single rate, not a daily rate or (what is available in the record) a monthly rate. The court holds that plaintiff must at least apply the various monthly rates for the period for which interest is due as to each bill.[23]

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[22] Plaintiff's Exhibit 87.

[23] Because interest does not start to accrue under Section 2705(b)(1) until the 30th day following the date on which the claim is presented to the responsible party or its insurer, there must necessarily be different interest calculations for each of the several separate billings presented to the defendants in this case. That is, interest does not accrue from a date of loss or some initial billing date. The interest calculation on all bills will cease when the particular bill is paid; and, if all bills are not paid on

(65) Defendants Hyundai Merchant Marine Co., Ltd., and Britannia Steam Ship Insurance Association, Ltd., are liable to plaintiff for a 6% penalty for failure to pay plaintiff within 120 days and monthly administrative fees under the Debt Collection Act.

(66) The court concludes that defendants Hyundai Merchant Marine Co., Ltd., and Britannia Steam Ship Insurance Association, Ltd., are indebted to plaintiff for removal costs in the total sum of $1,109,963.00, plus accrued interest through March 15, 1997, in the amount of $212,186.75, penalties in the amount of $270,213.25 as of November 25, 1996, and administrative fees of $600.00.

(67) Plaintiff is also entitled to recover from Hyundai Merchant Marine Co., Ltd., and Britannia Steam Ship Insurance Association, Ltd., taxable costs and attorney's fees as provided by local rules and OPA 90.

DATED at Anchorage, Alaska, this 31 day of March, 1997.

/s/ H. Russel Holland
H. Russel Holland, Judge
District of Alaska

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the same date, there will be different interest cut-off dates for the several bills. Because of the structure of the rate computation and, more particularly, the delay in publishing rates, it is not possible for the plaintiff to quote in advance a full payoff figure inclusive of all accrued interest. Interest can be estimated to within three to five days of the preparation of a combined statement which is inclusive of accrued interest.

A94-0391–CV (HRH)

M. WOODELL
R. BUNDY (US-ATTNY)
R. UNDERHILL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
vs.	)	
HYUNDAI MERCHANT MARINE CO., LTD., et al.,	)	No. A94-0391-CV (HRH)
Defendants.	)	

ORDER

(Filed Jul. 28, 1997)

Motion for Attorney's Fees

The United States moves for an award of attorney's fees.[1] The motion is opposed. Oral argument has not been requested and is not deemed necessary.

For the reasons and upon the authorities relied upon by the United States, principally in its reply memorandum,[2] the court concludes that an award of attorney's fees in the amount of One Hundred Four Thousand, Forty-Three Dollars and Seventy-Three Cents (104,043.73) is both lawful and reasonable. The clerk of court shall endorse the foregoing award on the judgment heretofore entered.

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[1] Clerk's Docket No. 101.

[2] Clerk's Docket No. 111.

DATED at Anchorage, Alaska, this 26 day of July 1997.

/s/ H. Russel Holland
H. Russel Holland, Judge
District of Alaska

FEDERAL WATER POLLUTION CONTROL ACT

33 U.S.C. § 1321. Oil and hazardous substance liability

(c) Federal removal authority

(1) General removal requirement

(A) The President shall, in accordance with the National Contingency Plan and any appropriate Area Contingency Plan, ensure effective and immediate removal of the discharge, and mitigation or prevention of the substantial threat of a discharge, of oil or a hazardous substance –

(i) into or on the navigable waters;

(ii) on the adjoining shorelines to the navigable waters;

(iii) into or on the waters of the exclusive economic zone; or

(iv) that may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States.

(B) In carrying out this paragraph, the President may –

(i) remove or arrange for the removal of the discharge, and mitigate or prevent a substantial threat of a discharge, at any time;

(ii) direct or monitor all Federal, State, and private actions to remove a discharge; and

(iii) remove and, if necessary, destroy a vessel discharging, or threatening to

discharge, by whatever means available.

(2) Discharge posing substantial threat to public health or welfare

(A) If a discharge, or a substantial threat of a discharge, of oil or a hazardous substance from a vessel, offshore facility, or onshore facility is of such a size or character as to be a substantial threat to the public health or welfare of the United States (including but not limited to fish, shellfish, wildlife, other natural resources, and the public and private beaches and shorelines of the United States), the President shall direct all Federal, State, and private actions to remove the discharge or to mitigate or prevent the threat of the discharge.

(B) In carrying out this paragraph, the President may, without regard to any other provision of law governing contracting procedures or employment of personnel by the Federal Government –

(i) remove or arrange for the removal of the discharge, or mitigate or prevent the substantial threat of the discharge; and

(ii) remove and, if necessary, destroy a vessel discharging, or threatening to discharge, by whatever means are available.

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(5) Obligation and liability of owner or operator not affected

Nothing in this subsection affects –

(A) the obligation of an owner or operator to respond immediately to a discharge, or the threat of a discharge, of oil; or

(B) the liability of a responsible party under the Oil Pollution Act of 1990 [33 U.S.C.A. § 2701 et seq.].

OIL POLLUTION ACT OF 1990

33 U.S.C. § 2701. Definitions

For the purposes of this chapter, the term –

(4) "claimant" means any person or government who presents a claim for compensation under this subchapter;

(30) "remove" or "removal" means containment and removal of oil or a hazardous substance from water and shorelines or the taking of other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches;

(31) "removal costs" means the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from such an incident;

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33 U.S.C. § 2702. Elements of liability.

(a) In general

Notwithstanding any other provisions or rule of law, and subject to the provisions this Act, each responsible party for a vessel or a facility from which oil is discharged, or which poses substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages specified in subsection (b) that result from such incident.

(b) Covered removal costs and damages

(1) Removal costs

The removal costs referred to in subsection (a) of this section are –

(A) all removal costs incurred by the United States, a State, or an Indian tribe under subsection (c), (d), (e), or (1) of section 1321 of this title as amended by this Act, under the Intervention on the High Seas Act (33 U.S.C. 1471 et seq.), or under State law; and

(B) any removal costs incurred by any person for acts taken by the person which are consistent with the National Contingency Plan.

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33 U.S.C. § 2712. Uses of Fund

(a) Uses generally

The Fund Shall be available to the President for –

(1) the payment of removal costs, including the costs of monitoring removal actions, determined by the President to be consistent with the National Contingency Plan –

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33 U.S.C. § 2715. Subrogation

(c) Actions on behalf of Fund

At the request of the Secretary, the Attorney General shall commence an action on behalf of the Fund to recover any compensation paid by the Fund to any claimant pursuant to this chapter, and all costs incurred by the Fund by reason of the claim, including interest (including prejudgment interest), administrative and adjudicative costs, and attorneys' fees. Such an action may be commenced against any responsible party or (subject to section 2716 of this title) guarantor, or against any other person who is liable, pursuant to any law, to the compensated claimant or to the Fund, for the cost against the responsible foreign government or other responsible party to recover any removal costs or damages paid from the Fund as the result of the discharge, or substantial threat of discharge, of oil from a foreign offshore unit.

Supreme Court, U.S.
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No. 99-142

In the Supreme Court of the United States

HYUNDAI MERCHANT MARINE COMPANY, LTD., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
DAVID W. OGDEN
Acting Assistant Attorney General
ROBERT GREENSPAN
ALFRED MOLLIN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

1878

QUESTIONS PRESENTED

1. Whether the Oil Pollution Act of 1990, 33 U.S.C. 2701 *et seq.*, authorizes the United States to recover monitoring and other costs incurred by the Coast Guard to prevent catastrophic damage to the environment threatened as a result of the grounding of petitioners' vessel.

2. Whether petitioners' due process rights were violated because they did not receive a hearing about whether the Coast Guard's costs were "prudent, or necessary, or reasonable."

3. Whether the court of appeals correctly determined that the Oil Pollution Act authorizes an award of attorney's fees in this action.

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In the Supreme Court of the United States

No. 99-142

HYUNDAI MERCHANT MARINE COMPANY, LTD., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 172 F.3d 1187. The findings of fact and conclusions of law of the district court (Pet. App. 39-71) are reported at 1997 Amer. Maritime Cases 2333.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1999. The petition for a writ of certiorari was filed on July 19, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Oil Pollution Act of 1990 (OPA or Act), 33 U.S.C. 2701 *et seq.*, to place the costs

of oil pollution upon those "responsible * * * for a vessel * * * from which oil is discharged, or which poses the substantial threat of a discharge of oil" into United States waters. 33 U.S.C. 2702(a). Section 1002(b)(1)(A) of the Act, 33 U.S.C. 2702(b)(1)(A), makes those responsible for threatened or actual pollution liable for the "removal costs and damages" incurred by the United States in carrying out certain of its obligations under Section 311(c) of the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. 1321(c) (1994 & Supp. III 1997). The Act defines removal costs to include "the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from such an incident." 33 U.S.C. 2701(31). The activities under the FWPCA for which such removal costs must be paid include, among other things, "mitigat[ing] or prevent[ing] a substantial threat of a discharge * * * [and] direct[ing] or monitor[ing] all Federal, State, and private actions to remove a discharge." 33 U.S.C. 1321(c)(1)(B)(i) and (ii).

2. On September 24, 1991, petitioners' vessel, the *Hyundai*, left Portland, Oregon, with a cargo of 24,000 tons of grain. The *Hyundai*'s fuel tanks were located in the very bottom of the vessel beneath the cargo holds and carried 200,000 gallons of a type of heavy fuel oil particularly dangerous to the environment. Pet. App. 41-42.

On October 2, 1991, petitioners' vessel ran aground in the Shumagin Islands of Alaska, a part of the Alaska Maritime National Wildlife Refuge and an area "of great environmental sensitivity." Pet. App. 42. Soon after the ship ran aground, at least three forward ballast tanks and one fuel tank ruptured, and "there

was a very great risk of serious environmental damage." *Id.* at 44. The *Hyundai*'s owners and insurers "assumed responsibility for the salvage and any necessary cleanup." *Id.* at 48. Nevertheless, for the first eight days of the pollution threat, the *Hyundai*'s owners and insurers had "no vessel on scene capable of dealing with a catastrophic situation." *Ibid.* At no time did the *Hyundai*'s owners have equipment in place sufficient to "manage[] both a break-up of [the *Hyundai*] and a spill of fuel in a storm." *Id.* at 50. The salvage operation planned by the *Hyundai*'s owners involved the use of grain evacuators to lighten the ship so that it could be refloated, but such devices sufficient to the task did not arrive on the scene until October 11, 1991, fully ten days after the vessel ran aground. *Id.* at 51-52. On October 12, 1991, the pollution threat finally abated when the *Hyundai* was refloated and towed to a temporary anchorage for repairs. *Id.* at 53.

The Coast Guard responded immediately to the *Hyundai*'s grounding, with the first vessel and helicopter arriving within hours. Pet. App. 43. The Coast Guard deployed additional ships and aircraft and, by October 5, 1991, had put in place specialized oil spill recovery equipment sufficient to deal with a serious oil spill. *Id.* at 47. The threat of a serious spill was substantial. The *Hyundai* was perched upon rocks and, on the fifth and sixth days after the grounding, a gale force Gulf of Alaska storm twisted and swung the ship 105 degrees around the rocks, causing additional damage to the *Hyundai*'s hull and an oil leakage visible in a sheen over 2000 feet long. *Id.* at 3, 51. There was "at all times a moderate risk that the [*Hyundai*] would break up." *Id.* at 47. Accordingly, to defend against this serious threat, the Coast Guard kept its equipment in place until efforts to refloat the *Hyundai* on October

12 were successful. Given the threat of an oil spill that could not have been contained by the *Hyundai*'s owners, the district court concluded that "it would have been irresponsible for the Coast Guard not to have undertaken the actions which it took, even though the owners and insurers assumed responsibility for the incident." *Id.* at 48-49.[1] The cost to the Coast Guard for maintaining its oil spill equipment at the scene until the threat of a major spill abated was $1.1 million. *Id.* at 70.

The United States brought this action to recover its costs pursuant to the OPA. The district court made findings of all relevant facts and conclusions of law. Pet. App. 39-71. The court noted that "the parties agree with the general proposition that the arbitrary and capricious standard be used to evaluate the [Coast Guard's] decisions." *Id.* at 35. The court thus concluded that the OPA authorized the recovery of removal costs from a responsible party if the costs were rationally incurred. *Ibid.* The court then reviewed *de novo* the actions taken by the Coast Guard and held that the claimed costs were "neither arbitrary nor capricious, and, under the extreme and sensitive circumstances of this * * * [incident], were also reasonable and necessary costs." *Id.* at 62. It calculated the government's removal costs as $1,109,963, and awarded the government that sum plus interest. *Id.* at 70. In addition, the court awarded the government approximately $104,000 in attorney's fees. *Id.* at 72.

---

[1] A Coast Guard cutter accompanied the *Hyundai* to its temporary anchorage, where it was learned that there were a "total of 133 cracks in the hull of the vessel, one of which was 6 feet wide and 42 feet long." Pet. App. 53.

3. The court of appeals affirmed. Petitioners argued that the OPA authorized only the recovery of costs actually incurred in removing oil from the water. The court of appeals noted that "Hyundai's emphasis on actual removal unduly minimizes the importance of the Coast Guard's emergency stand-by operation, which qualifies as an act of 'prevention,' the cost of which is clearly recoverable under the terms of the definition [of 'removal costs'] as it applies to the liability imposed by § 2702 [of the OPA]." Pet. App. 7. Petitioners also challenged the assessment of what it termed "monitoring costs," relying on *National Cable Television Ass'n* v. *United States*, 415 U.S. 336 (1974) (*NCTA*). However, the court of appeals noted that this Court's decision in *NCTA* was not apposite, because *NCTA* "reminded Congress that it may not delegate away its taxing power to an executive agency * * * [but] [t]he OPA authorizes recovery of costs, not taxation." Pet. App. 7-8 (internal citations omitted). Finally, the court of appeals rejected petitioners' claim that attorney's fees are not warranted under the OPA. The court of appeals noted that 33 U.S.C. 2715 authorizes the payment of attorney's fees to the United States in actions brought to recover the payment of removal costs in these circumstances.

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. Petitioners assert that a conflict exists among the circuits on the application of this Court's decision in *National Cable Television Ass'n* v. *United States*, 415 U.S. 336 (1974). They contend that *NCTA* states a rule of general applicability concerning when a regulatory

statute should be construed to permit an agency to recover certain operating costs from a party, and that the Third and Ninth Circuits have applied *NCTA* in conflicting ways to "costs incurred by the Government in monitoring environmental response operations." Pet. 7. Those contentions are without merit. To manufacture a conflict, petitioners misinterpret *NCTA* and overlook important distinctions between the costs at issue in the Third and Ninth Circuit decisions.

NCTA concerned "fees" that the Federal Communications Commission (FCC) imposed upon all cable television licensees. This Court held that the term "fee" implies a notion of a benefit conferred, and it concluded that a "fee" calculated to reimburse the FCC for all of its operating expenses for the regulation of cable television, rather than to pay for value received by the regulated party, was in the nature of a tax, not a "fee." To avoid the necessity to decide the constitutional question of the adequacy of such a delegation of the taxing power, the Court read the statute narrowly, as not having delegated Congress's taxing authority to the agency, and remanded to the FCC for reconsideration of the fee. See 415 U.S. at 343.

The court of appeals correctly rejected petitioners' contention that *NCTA* controls this case, holding that *NCTA* does not apply because the OPA "authorizes recovery of costs, not taxation." Pet. App. 8. The district court carefully determined the actual costs incurred by the Coast Guard and correctly concluded that the plain language of OPA requires "each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil" to be "liable for the removal costs and damages specified in subsection (b) that result from

such incident." Pet. App. 63 (quoting 33 U.S.C. 2702(a)).

Petitioners contend that a Third Circuit decision applying the *NCTA* doctrine to the government's "costs incurred in overseeing a private removal [of pollution] under * * * CERCLA [the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9607 (1988)]" conflicts with the decision below. See Pet. 6 (citing *United States* v. *Rohm and Haas Co.*, 2 F.3d 1265 (3d Cir. 1993)). That contention is incorrect. First, *Rohm and Haas* arose under a different statute from OPA, with different statutory mechanisms and requirements for the recovery of governmental costs.[2] Second, it is doubtful whether, even under *Rohm and Haas*, the Third Circuit would have decided this case differently. *Rohm and Haas* concerned "costs incurred by the government in monitoring private parties' compliance with their legal obligations." 2 F.3d at 1273. The *Rohm and Haas* defendants had spent 15 years cleaning up a hazardous waste site pursuant to an order by the Environmental

---

[2] Even within the context of CERCLA, the Third Circuit's *Rohm and Haas* decision has been widely rejected by courts that subsequently have considered the issue. See, *e.g.*, *United States* v. *Lowe*, 118 F.3d 399, 401 n.2 (5th Cir. 1997) (*Rohm*'s reliance on *NCTA* "represented a significant departure from prior case law"); *Atlantic Richfield Co.* v. *American Airlines, Inc.*, 98 F.3d 564, 567 (10th Cir. 1996); *Pneumo Abex Corp.* v. *Bessemer & Lake Erie R.R.*, 936 F. Supp. 1250, 1261-1262 (E.D. Va. 1996); *Town of New Windsor* v. *Tesa Tuck, Inc.*, 935 F. Supp. 317, 324-327 (S.D.N.Y. 1996); *California* v. *Celtor Chem. Corp.*, 901 F. Supp. 1481, 1489-1490 (N.D. Cal. 1995); *California Dep't of Toxic Substances Control* v. *SnyderGeneral Corp.*, 876 F. Supp. 222, 225 (E.D. Cal. 1994). See also *New York* v. *Shore Realty*, 759 F.2d 1032, 1043 (2d Cir. 1985) (holding that remand costs of the type rejected by *Rohm and Haas* court could be recovered under CERCLA).

Protection Agency (EPA) made under its CERCLA authority. *Id.* at 1268. The EPA oversaw the post-spill clean-up efforts and subsequently sought reimbursement for its oversight costs, relying upon a CERCLA provision that allowed recovery of "removal costs" it incurred. Unlike the monitoring and cleanup costs at issue here, which were directed at prevention and mitigation of a potential disaster in the making, the actual release of pollutants in *Rohm and Haas* had long since passed when the contested post-spill monitoring and oversight costs were incurred.

In construing the CERCLA provisions relating to the EPA's post-spill administrative oversight costs, the Third Circuit invoked *NCTA*, concluding that an agency's imposition of costs for the oversight of a polluter's post-spill clean-up was in the nature of a tax. Relying upon *NCTA* for the proposition that statutes imposing tax-like obligations must be construed narrowly, the court interpreted the specific CERCLA provisions not to include the types of administrative and oversight costs at issue there. The court, however, was careful to distinguish from its holding the kinds of removal costs at issue in this case, noting that CERCLA authorizes recovery of removal costs for "actual monitoring of a release or threat of release." 2 F.3d at 1275. As the court further explained:

> To assist the district court in carrying out this task, we conclude our discussion regarding oversight costs by further elucidating what we perceive to be the statutory distinction between recoverable and non-recoverable costs. Where the government takes direct action to investigate, evaluate, or monitor a release, threat of release, or a danger posed by such a problem, the activity is a "removal" and its

> costs are recoverable. *See* 42 U.S.C. § 9604(b) (1988). This includes the costs, no matter at what stage incurred, of ascertaining whether and to what extent the risk has been reduced or eliminated by the chosen response. Similarly, if the activity is intended to enable EPA to formulate a position on what would be the most appropriate response action at a given facility, the cost is recoverable.

Id. at 1278.

Because this case concerns costs incurred in the Coast Guard's monitoring of the ongoing substantial threat of a major spill from a vessel still in danger of breaking up, there is no reason to suppose that the *Rohm and Haas* court would have decided this case differently than did the court below. As the district court noted, for the first eight days of the incident the petitioners had no credible pollution response vessels on scene. On day nine petitioners' salvage tug finally arrived; on day eleven the grain cargo evacuators began their work of lightening the vessel's load; and only on day twelve, October 12th, was the *Hyundai* floated off the rocks and the pollution threat substantially lessened. See pp. 2-4, *supra*.

During that period the Coast Guard vessels, equipment, aircraft, and personnel were on the scene and incurring the monitoring costs at issue. As the district court found, the possibility that the *Hyundai* would break up and cause a massive spill during that period posed a "real, significant risk." Pet. App. 52. Therefore, the Coast Guard was guarding against the continued threat of a pollutant release, not merely monitoring post-spill clean-up activities, as in *Rohm and Haas*.

2. Petitioners argue that they were deprived of due process by the manner in which the Coast Guard sought

to recover its removal costs. Petitioners complain that they had no opportunity for administrative review of the Coast Guard's decisions, with review available only in the district court. Pet. 10. Petitioners then assert:

> Because [petitioners] had no prior opportunity to challenge the Coast Guard's cost bill * * * the application of the arbitrary and capricious standard by the District court without regard to whether the costs were necessary, deprived [petitioners] of meaningful review * * *.
>
> * * * Deferring to the [Coast Guard's] decisions by applying the arbitrary and capricious standard during that initial review [by the district court] deprives the responsible party of meaningful review.

Pet. 10-11. Petitioners did not raise that issue in the courts below.[3] Indeed, the district court found that "the parties agree with the general proposition that the arbitrary and capricious standard be used to evaluate the [cost] decisions." Pet. App. 35. That issue therefore is not properly before this Court. See, *e.g.*, *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976).

Second, petitioners invoke this Court's decision in *Concrete Pipe and Products of California, Inc.* v. *Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 (1993), for the proposition that "an agency action that is essentially non-adjudicative in character cannot, as a constitutional matter, be afforded deference during the initial review by a neutral adju-

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[3] Petitioners state that they did argue this issue to the Ninth Circuit, Pet. 11 n.3, but provide no citation to any part of their briefs that raised this issue, nor are we aware of any.

dicator." Pet. 12.[4] Petitioners in fact received full, *de novo* review in the district court. In making its factual findings, the district court "appl[ied] the preponderance of the evidence rule as to the party (the United States) having the burden of proof." Pet App. 44 n.4. The district court made extensive, well reasoned findings on all relevant facts. *Id.* at 39-62. The court then determined *de novo* whether the actions found as a fact to have occurred were rationally taken by the Coast Guard. *Id.* at 62. The court expressly found that the Coast Guard's actions and costs were neither arbitrary nor capricious and, "under the extreme and sensitive circumstances of this [marine environment pollution] project, were also reasonable and necessary costs." *Ibid.*

Petitioners' contention that they are entitled to review of whether any particular cost is "prudent, or necessary" (Pet. 10) finds no support in the text of the OPA, which contains no such limitation. See 33 U.S.C. 2702(a). The court of appeals thus correctly held that OPA "does not authorize the imposition of any higher standard" than whether the recovery of removal costs sought by the United States is "arbitrary or capricious." Pet. App. 10.

3. Petitioners contend that the courts below erred in allowing for the recovery of monitoring costs, "base costs," and attorney's fees. Pet. 13-16. The court of

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[4] In *Concrete Pipe*, this Court held that provisions of the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208, do not violate due process through judicial review of an arbitrator's determinations when in such judicial review "there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct." 508 U.S. at 611 (quoting 29 U.S.C. 1401(c)).

appeals properly decided those issues under the OPA, and no other court of appeals has addressed them.

First, with respect to monitoring costs, Congress provided in OPA Section 2702(a) that persons whose vessels discharge or "which pose[] the substantial threat of a discharge of oil" are liable for "all removal costs incurred by the United States." 33 U.S.C. 2702(b)(1)(A). In Section 2702(b), Congress provided for recovery of "all removal costs incurred by the United States * * * under subsection (c), (d), (e), or (*l*) of [the FWPA, 33 U.S.C. 1321]." 33 U.S.C. 2702(b)(1)(A). Under the FWPCA, in turn, the United States may recover costs for "monitor[ing] all Federal, State, and private actions to remove a discharge." 33 U.S.C. 1321(c)(1)(B)(ii). See Pet. App. 4-7. OPA thus specifically included monitoring within the scope of recoverable removal activities, and the court of appeals concluded that the Coast Guard's monitoring of the *Hyundai* was undertaken as part of "its effort to prevent or minimize a threatened oil discharge." *Id.* at 7.

Second, with regard to base costs, the court of appeals noted that "[t]he fact that, if this near-disaster had not occurred, the personnel would have been paid to perform some other task does not alter the reality that the mishap did occur and [the] Coast Guard personnel were paid to monitor a potential spill." Pet. App. 10-11. The court then noted that "[b]ase costs represent real costs to the United States and are recoverable to the extent they are allocable to a response to an oil spill." *Id.* at 11. The court's conclusion is consistent with the FWPCA case law used by Congress

as the foundation of the OPA,[5] as well as consistent with case law under other environmental statutes and the general maritime law, all of which allow recovery of base costs and administrative costs and overhead allocable to the event.[6]

Finally, petitioners claim that attorney's fees are not properly awarded here because, they contend, this is not an action to recover removal costs paid from the Oil Spill Liability Trust Fund, as required by 33 U.S.C.

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[5] Congress expressly looked to the case law under the FWPCA (also referred to as the Clean Water Act) as the framework for the OPA. See S. Rep. No. 94, 101st Cong., 2d Sess. 10-12 (1990). Under the FWPCA, the United States' recovery is not conditioned upon any proof of "necessity" or even "reasonableness." See, *e.g.*, *Commonwealth of Puerto Rico* v. *SS ZOE COLOCOTRONI*, 456 F.Supp. 1327, 1347 (D.P.R. 1978) (recovery is "measured by the Government's actual costs regardless of their reasonableness"), aff'd in part, vacated in part on other grounds, 628 F.2d 652 (1st Cir. 1980), cert. denied, 450 U.S. 912 (1981). Under the FWPCA, administrative and overhead costs are recoverable. See, *e.g.*, *United States* v. *MORANIA BARGE 200*, 1983 Amer. Maritime Cases 2761, 2764 (E.D.N.C. 1982) (FWPCA costs include Coast Guard internal costs for personnel, material, equipment, supplies, overhead, and other internal costs); *United States* v. *Slade, Inc.*, 447 F. Supp. 638 (E.D. Tex. 1978); *United States* v. *Hollywood Marine, Inc.*, 519 F.Supp. 688, 692 (S.D. Tex. 1981); David A. Bagwell, *Hazardous and Noxious Substances*, 62 Tul. L.Rev. 433, 443 (1988). See also *Union Petroleum Corp.* v. *United States*, 651 F.2d 734, 744 (Ct. Cl. 1981) (holding polluter liable for government's costs).

[6] See, *e.g.*, *United States* v. *R.W. Meyer, Inc.*, 889 F.2d 1497, 1502-1504 (6th Cir. 1989), cert. denied, 494 U.S. 1057 (1990) (CERCLA); *United States* v. *American Cyanamid Co.*, 786 F. Supp. 152, 156 (D.R.I. 1992) (same); *United States* v. *Hardage*, 750 F. Supp. 1460, 1504 (W.D. Okla. 1990) (same), cert. denied, 510 U.S. 913 (1993). See also *Freeport Sulphur Co.* v. *S.S. HERMOSA*, 526 F.2d 300, 303-304 (5th Cir. 1976) (general maritime law).

2715(c) (Supp. III 1997). Petitioners concede, however, that the recovery of funds in this case will be paid into the Oil Spill Liability Trust Fund. Pet. App. 12. Accordingly, as the court of appeals noted, any argument based upon the "happenstance that, as a matter of accounting, the Fund paid for the removal costs after, rather than before, the claim against the responsible party was litigated," would defeat the purposes of the OPA by elevating form over substance. *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
DAVID W. OGDEN
Acting Assistant Attorney General
ROBERT GREENSPAN
ALFRED MOLLIN
Attorneys

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No. 99-142

In The

Supreme Court of the United States

HYUNDAI MERCHANT MARINE COMPANY, LTD., and BRITANNIA STEAM SHIP INSURANCE ASSOCIATION LIMITED,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE*, THE INTERNATIONAL GROUP OF P & I CLUBS, IN SUPPORT OF PETITIONERS

ROBERT D. FEIGHNER
Attorney at Law
Counsel of Record
400 Oceangate, Suite 520
Long Beach, California 90802
Telephone: (562) 435-5172

Attorney for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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Leslie J. Buglass, *Marine Insurance and General Average in the United States* 386-418 [3d ed. 1991] 1

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INTERESTS OF AMICUS

Amicus,[1] The International Group of P & I Clubs (the "Group"), represents 19 mutual insurance associations known as "P & I clubs."[2] P & I clubs are "associations of shipowners banded together to spread and absorb liabilities falling on their members." Grant Gilmore & Charles L. Black, Jr. *The Law of Admiralty* 76 [2d ed. 1975]; see also Leslie J. Buglass, *Marine Insurance and General*

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[1] Both Petitioner and the Solicitor General have consented to the filing of this brief. Copies of the letters of consent are being concurrently filed. Counsel for a party did not author this brief in whole or in part, and no person or entity, other than the *amicus curiae*, its members or its counsel, made a monetary contribution to the preparation of this brief.

[2] The Group's nineteen members include: (1) American Steamship Owners Mutual P & I Association Inc.; (2) The Britannia Steam Ship Insurance Association Limited; (3) Assuranceforeningen Gard; (4) The Japan Ship Owners Mutual P & I Association; (5) Liverpool & London Steamship P & I Association Limited; (6) The London Steam-Ship Owners Mutual Insurance Association Limited; (7) The North of England P & I Association Limited; (8) The Shipowners Mutual P & I Association Limited (Luxembourg); (9) Assuranceforeningen Skuld; (10) Skuld Mutual Protection and Indemnity Association (Bermuda) Limited; (11) The Standard Steamship Owners P & I Association Limited; (12) The Standard Steamship Owners P & I Association (Bermuda) Limited; (13) The Standard Steamship Owners P & I Association (Europe) Limited; (14) The Steamship Mutual Underwriting Association Limited; (15) The Steamship Mutual Underwriting Association (Europe) Limited; (16) The Steamship Mutual Underwriting Association (Bermuda) Limited; (17) Sveriges Angfartygs Assurans Forening; (18) The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited; (19) The West of England Ship Owners Mutual Insurance Association (Luxembourg).

Average in the United States 386-418 [3d ed. 1991]. The members of the Group are owners and operators from practically all maritime nations, insuring in the aggregate tens of thousand of vessels totaling in excess of 400 million gross tons or more than 90% of the world's blue water tonnage.

Oil spill response and related claims under the Oil Pollution Act of 1990, 33 U.S.C. § 2701 et seq. ("OPA 90") and related state legislation represent a significant risk for which the Group insures its members. The Oil Spill Intelligence Report lists 826 oil spills of over 10,000 gallons (34 Tonnes) from 1962-1997 in United States marine waters alone.[3] Of these spills, 506 or 61.3% involved vessels and accounted for more than 82% of the total amount of oil spilled.

From 1987 through July 20, 1999, $1,554,775,431.00 in larger pollution claims were passed on to the Group, of which $758,368,234.00 were on the pool and $796,407,198.00 were on the Group reinsurance. These pollution related claims represented 38.06% of pool claims and 76.71% of Group reinsurance claims. Clearly, the Group and its shipowner members have a direct and

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[3] "Oil Spill Intelligence Report," White Paper Series, Vol. 2, No. 2, March 1998. These figures necessarily underrepresent the risk of exposure to the Group, as is highlighted by the facts of this Petition. The spill arising from the grounding of the *Hyundai No. 12* involved substantially less than the threshold 10,000 gallon reporting figure adopted by the Report, and still resulted in actual cleanup costs of $4.5 million, plus the judgment on behalf of the United States totaling $1,702,553.51 (later amended to exclude penalties under the Debt Collection Act.)

substantial interest in the manner in which OPA 90 is interpreted, as does the public, which will ultimately pay for the unfettered, unjustified government costs.

STATEMENT OF THE CASE

The Petition for Writ of Mandate (the "Petition") filed by Hyundai Merchant Marine Company, Ltd. ("Hyundai") and Britannia Steam Ship Insurance Association Limited ("Britannia")[4] concerns the Ninth Circuit Court of Appeals' interpretation of OPA 90 as applied not to the actual cost of oil spill cleanup, but instead to attendant monitoring and base costs incurred by the United States Coast Guard ("Coast Guard") and other governmental agencies. It arises out of the grounding of the M/V *Hyundai No. 12* on October 2, 1991 in an environmentally sensitive area. The *Hyundai No. 12* was owned and insured by Hyundai and Britannia, respectively.

The Petition does not address Hyundai's responsibilities of actual cleanup as responsible party, as those duties were fully discharged. As the Ninth Circuit noted, "Hyundai, however, performed the actual work of containing the spill and freeing the ship, at great expense to itself." (App. 3.) The district court concurred, somewhat more expressively, emphasizing that "The court finds that the vessel owner, her insurers, and their contractors responded with reasonable promptness, diligence, and competency in carrying out their responsibilities under

[4] Hyundai and Britannia will be referred to collectively as "Petitioners."

OPA 90 in light of the difficult circumstances and remote location of the grounding of the M/V *Hyundai No. 12.*" (App. 52.)

Nor does the Petition involve a major oil spill or resulting ecological disaster. Although the record is imprecise with regard to the actual amount of oil spilled, the district court found only that " . . . from time to time, small leaks of oil and sheen were observed." (App. 47.) The Ninth Circuit asserted that "fortunately, only minor spillage occurred before Hyundai was able to free the ship and tow it to repair docks." (App. 3.) The Petition confirms that "only a small amount of the approximately 200,000 gallons of fuel oil leaked during the incident." (Pet. 3.)

The Petition, therefore, focuses not upon the $4.5 million pollution response effort undertaken by Hyundai under OPA 90, but rather upon the $1,322,149.00 awarded to the United States as monitoring costs, including base or overhead costs. While the district court understood that reasonableness, prudence and necessity were crucial to any review, particularly in light of the fact that the district court was the first and only instance of factual review, the Ninth Circuit refused to limit the application of the arbitrary and capricious standard in any meaningful way. Instead, in response to Hyundai's claim that the judgment included substantial unnecessary and unreasonable expense, the Ninth Circuit advised that " . . . OPA does not restrict the recovery of the United States to costs that were prudent, necessary, or reasonable." (App. 9.)

The Ninth Circuit's opinion will have a vast and dramatic effect on future cases within the Ninth Circuit,

as well as other jurisdictions which follow its lead. Given the Group's role as the insurer of 90% of the world's merchant ocean-going tonnage, it respectfully requests that this Court grant the Petition and establish procedural and substantive limits on the monitoring costs, including base costs, which the United States government and other entities will be allowed to recover in future spills.

SUMMARY OF ARGUMENT

The Ninth Circuit's application of the arbitrary and capricious standard at the first instance of review, without concern for reasonableness, prudence, necessity or any similar factor encourages courts to allow unrestricted, wasteful spending by the Coast Guard in monitoring an oil pollution response. Without fully considering the consequences, the Ninth Circuit has taken a standard of review designed to be applied by a reviewing court in addressing final agency actions and blindly applied it to situations where the district court is, in the first instance, reviewing the on-the-scene decisions of the Federal On Scene Commander ("FOSC") at an oil pollution response. By itself, this approach creates substantial constitutional problems, but, when coupled with the Ninth Circuit's directive that costs charged need not be "reasonable, prudent or necessary," the prejudice to the responsible party, and ultimately the Group, is insurmountable.

As a result, responsible parties are required to pay limitless monitoring costs, which include gross excess

and duplication, waste caused by outside political pressures and an unspecified but escalating component for base costs, representing indirect governmental overhead. The effect is to deprive Petitioners of due process, and at the same time produce an unwarranted subsidization of the United States government in one of the essential functions of the Coast Guard.

ARGUMENT

1. BY EMPLOYING THE ARBITRARY AND CAPRICIOUS STANDARD AT THE FIRST INSTANCE OF REVIEW WITHOUT CONCERN FOR REASONABLENESS, PRUDENCE, NECESSITY OR ANY SIMILAR FACTOR, THE NINTH CIRCUIT HAS ENCOURAGED OTHER COURTS TO ALLOW UNRESTRICTED SPENDING BY THE UNITED STATES GOVERNMENT.

In proclaiming that OPA 90 does not restrict the recovery of the United States to costs that were "prudent or necessary or reasonable," the Ninth Circuit has issued a directive to future courts that governmental waste or excess arising from the Coast Guard's monitoring efforts, whether caused by neglect, ignorance or any other factor short of that approaching actual bias or ill motive, is to be tolerated and, in effect, encouraged. When coupled with the fact that in cases involving oil pollution response there is no possible opportunity to obtain review of the government's actions prior to the district court's application of the arbitrary and capricious standard, Petitioners' constitutional rights to due process will continue to be

violated as unrestricted monitoring costs continue to mount.

The threshold problem arises as a result of the Ninth Circuit's adoption of the arbitrary and capricious standard of review from the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A). The APA, however, utilizes that standard in describing the standard of review to be applied by a reviewing court in addressing *final agency actions*. 5 U.S.C. §§ 107, 706; *United States v. Attati & Goss, Inc.*, 900 F.2d 429 (1st Cir. 1990.) As Petitioners have emphasized, the actions of the FOSC at an oil pollution response are not "final agency actions." See *Conoco, Inc. v. United States*, 1994 WL 24249, *2 (E.D. La. 1994). To the contrary, the decisions of the FOSC are often necessarily "on the spot" decisions which, by their nature, cry out for subsequent meaningful review. Yet the Ninth Circuit has mandated that the judiciary need not be concerned with the reasonableness, prudence or even necessity of any item of cost, despite the absence of any prior meaningful review of the FOSC's decisions.

At least some attempt at a reconciliation of the judicial tension between the application of the arbitrary and capricious standard with the need for meaningful review appears in the district court's opinion in *United States v. Murphy Exploration and Production Co.*, 939 F.Supp. 489 (E.D. La. 1996). In *Murphy*, the United States sued to recover some $16,951.50 for helicopter overflights calculated on the basis of a charge of $3,767.00 per hour (roughly five hours of flight.) Murphy opposed the government's claim, emphasizing that it had performed a total of 48 helicopter overflights over a three day period by privately leasing a helicopter for a total cost of

$1,278.00 per day. Murphy also argued that the private helicopters were available for government use.

In agreeing with Murphy to limit the government's cost to $1,278.00 per day, the district court made two essential points. First, in paraphrasing Petitioners' due process argument, the court noted that " . . . to suggest that a cost is recoverable if the requisite causation exists simply because the FOSC authorized it in substance deprives a responsible party of any judicial review, and such a position would pose a serious due process problem." (939 F.Supp. at 493.)[5] Second, the court in *Murphy* recognized a need for some type of qualitative limit, which it described as "fairness and proportionality" in the analysis of what is arbitrary and capricious. (939 F.Supp. at 493.)[6]

The Ninth Circuit, however, has now restricted any such analysis. "Fairness and proportionality" have, in all likelihood, gone the way of reasonableness, prudence and necessity. In short, there is no basis upon which to limit the courts' future use of an inflexible standard of review, which, according to the Ninth Circuit is to be applied

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[5] Oddly, Judge Berrigan in the *Murphy* decision quotes from Judge Holland's Order on Motion for Partial Summary Judgment/Removal Costs in the case below. (App. 37.) That same sentiment seems to have been forgotten in the district court's final resolution of the case and ignored completely by the Ninth Circuit.

[6] Judicial concern for providing the United States government (in this case EPA under the companion CERCLA statute, 42 U.S.C. § 9607) a "blank check in response actions" was also raised by the Fifth Circuit in *Matter of Bell Petroleum Services, Inc.*, 3 F.3d 889, 906-908 (5th Cir. 1993).

without regard to the fairness, necessity or reasonableness of any cost.

2. THE BLANK CHECK PROVIDED TO THE COAST GUARD BY THE NINTH CIRCUIT MAKES POSSIBLE SUBSTANTIAL, IDENTIFIABLE ABUSES PERTAINING TO (A) EXCESSIVE AND UNNECESSARY MONITORING COSTS; (B) IMPROPER, INEFFICIENT AND POLITICALLY MOTIVATED DECISIONS; AND (C) CONTINUALLY UNSPECIFIED BUT MOUNTING BASE COSTS.

A. THE OPINION APPROVES THE RECOVERY OF UNCHECKED GOVERNMENTAL MONITORING COSTS, THEREBY SUBSTANTIALLY AND UNNECESSARILY INCREASING THE COST OF CLEANUP.

In discussing the subject of monitoring costs, it is important to focus upon the literal definition of that term. Inevitably, as in this case, the task of actual cleanup is performed by the responsible party, not by the Coast Guard. At issue is what amount of cost is to be allowed for purposes of supervision, overseeing or other related consultation,[7] and what party is to be charged for those activities.

Depending upon how the judgment below is characterized, monitoring costs relating to this incident

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[7] Admittedly, the Coast Guard may perform a vital function at the inception of an incident, but that concept is not principally at issue. The majority of Petitioners' objections below related to costs arising from subsequent monitoring efforts.

increased the total cost of this spill by roughly 29%.[8] In absolute terms, the Group was required to pay an additional $1,322,149 in monitoring costs, over and above its actual cleanup costs. Unfortunately, the charge for substantial monitoring costs incurred by the Coast Guard in the *Hyundai No. 12* incident has become all too commonplace.

Other spills demonstrate similar results. In the *North Cape* incident occurring on January 19, 1996 in Moonstone Beach, Rhode Island, the Group was required to pay the government slightly less than $3,400,000.00 in addition to actual cleanup costs in excess of $4,500,000.00. Costs paid to the government as monitoring costs totaled $4,000,000.00 in the *Tampa Bay* incident occurring on August 10, 1993, while government demands relating to the *Kuroshima*, an incident arising out of Summer Bay, Alaska on November 26, 1997, are expected to approximate $3,800,000.00. Governmental costs arising out of a February 4, 1999 incident in Coos Bay, Oregon involving the *New Carissa* will likely exceed all prior estimates.

Accordingly, the Group's interest and that of its mutually insured shipowner members in the Petition is not merely conceptual, as, by any standard, the payment of such significant monitoring costs represents a substantial additional expense. Even worse, much of the monitoring expense incurred will continue to be both duplicative

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[8] Excluding attorneys' fees, penalties and administrative fees, the district court awarded what it termed "removal costs" in the total sum of $1,109,963.00, plus interest in the amount of $212,186.75 over an assumed actual cleanup cost of $4,500,000.00.

and unnecessary, as the Ninth Circuit has foreclosed any meaningful challenge.

B. THE NINTH CIRCUIT HAS ENCOURAGED THE GOVERNMENT'S EXPENDITURE OF IMPROPER, INEFFICIENT AND EVEN POLITICALLY MOTIVATED COSTS WHICH DRASTICALLY INCREASE THE COST OF CLEANUP.

Much of the government's waste and inefficiency results simply from overkill. In the *Hyundai No. 12*, for instance, the Coast Guard brought four vessels to the scene, one of which served largely as a hotel (at a cost of $97,000.00). Petitioners were charged more than $132,000.00 for transportation of equipment which was unuseable (although Petitioners were not charged for the equipment.) Government supervisory or monitoring personnel far outnumbered the number of private individuals involved in actual cleanup.

Other examples are equally egregious. In the *New Carissa* incident, the Coast Guard required the use of an extremely expensive pumping system which ultimately pumped more than 135,000 gallons of fluid from the vessel. . . . of which some 250 gallons turned out to be oil. Sadly, the Ninth Circuit's approach offers no disincentives to such expenditures.

At other times, governmental agencies can be affected by political pressures. The tendency to require a procedure known as "high pressure hot water," (sometimes referred to colloquially as "steam cleaning") to an oil infested beach area has often been documented, even

though this procedure is far more expensive as well as substantially more hazardous to the environment. While a high volume moderate pressure or low pressure flush might well allow some level of algal residue to remain (and thus the life cycle to continue to regenerate), such a procedure does not appear as "clean" on the eleven o'clock news. Similarly, expensive skimming procedures are often employed, even when they have little chance of ultimate success, particularly in inclement weather, solely because of the image the Coast Guard hopes to create.

In other instances, the Coast Guard simply has too many agendas to fill. In many instances, functions other than "marine environmental response" are the real reason for the Coast Guard's appearance. In the *Hyundai No. 12* incident, for instance, the contemporaneous records of the *Sherman*, one of the four vessels which the Coast Guard sent to the scene, reveal that the mission listed for the vessel was either "Alaskan fishery patrol" or "search and rescue Alaska fishery patrol," but never "marine environmental response."

These "marine environmental responses" represent an opportunity for the Coast Guard to employ its personnel,[9] which, by itself, may not be inappropriate. Charging Petitioners or other responsible parties for that exercise, however, raises serious questions. Blindly passing those costs along without allowing Petitioners the opportunity to contest either the reasonableness or necessity of the charge not only raises grave constitutional concerns, but

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[9] Discovery in various spills reflects an extremely high number of Coast Guard personnel on "guard duty" being shuffled in and out of the scene.

also needlessly escalates the cost of oil pollution response.

C. THE NINTH CIRCUIT HAS DIRECTED THE RECOVERY OF UNSPECIFIED AND MOUNTING BASE COSTS WHICH BEAR NO DIRECT RELATION TO THE ACTUAL COST OF CLEANUP.

A substantial portion of the judgment below encompassed what have been referred to as "base costs." Base costs include costs which the Coast Guard would have incurred even in the absence of an oil spill, such as routine salaries and depreciation or capital costs which do not "result from" the incident. While the Petition demonstrates various rationales why these costs are not recoverable under OPA 90 (see Petition at 9, 14), the Group raises yet another significant practical concern.

In conducting its own informal study in an attempt to learn the impact of the unfettered award of base costs, the Group found that it was simply unable to quantify the amount of base costs charged from incident to incident. The Coast Guard decides upon the amount it will charge without providing any basis upon which the charge is calculated, thereby foreclosing any meaningful challenge by the party charged. The end result is that the responsible party has no idea precisely which salaries up the chain of command it is being asked to pay. By definition, each of these salaries would have been paid by the proper governmental agency in the absence of a marine environmental response.

To provide this Court with some form of quantitative analysis, Charles King, Petitioners' expert economist, testified at trial that the Coast Guard's costs which were actually incurred as a result of (i.e. but for) this incident were in the amount of $118,922.38. Yet the government was awarded more than $1,322,149, including interest, strictly for monitoring costs, a substantial portion of which represented base costs.

3. AS A RESULT, THE NINTH CIRCUIT HAS ARBITRARILY AND SUBSTANTIALLY INCREASED THE COST OF CLEANUP, THEREBY REQUIRING UNWARRANTED SUBSIDIZATION OF THE UNITED STATES GOVERNMENT.

The effect of the Ninth Circuit's opinion is to require Petitioners, and ultimately the shipowners, to subsidize the Coast Guard in the area of oil pollution response. Two principal problems result from this approach. First, an inordinately large amount of resources must be committed to oil pollution response, as overall costs skyrocket. Second, the shipowners are required to shoulder a disproportionate amount of that burden, as, despite the increase in waste and duplication, there is no judicial requirement that the Coast Guard act reasonably or prudently. The Ninth Circuit's approach now insulates the government's cost excesses from any meaningful review.

CONCLUSION

For these reasons, the Group respectfully urges this Court to grant the petition for writ of certiorari filed by Hyundai Merchant Marine Company, LTD, and Britannia Steam Ship Insurance Association Limited.

Dated: September 20, 1999

Respectfully submitted,

ROBERT D. FEIGHNER,
Attorney at Law
Counsel of Record
400 Oceangate, Suite 520
Long Beach, California 90802
Telephone (562) 435-5172

Attorney for Amicus Curiae
The International Group
of P & I Clubs